INDEX

CITATIONS

CASES: Page

CITATIONS—Continued

CITATIONS—Continued

CITATIONS—Continued

STATUTES AND REGULATIONS:

CITATIONS—Continued

CITATIONS—Continued

CITATIONS—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-394, 72-414, 72-528, 72-555, 72-666

CASPER W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, AND CHARLES C. EDWARDS, COMMISSIONER OF FOOD AND DRUGS,

Petitioners,

v.

HYNSON, WESTCOTT & DUNNING, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

AND CONSOLIDATED CASES

MOTION FOR LEAVE TO FILE BRIEF FOR PHARMACEUTICAL MANUFACTURERS ASSOCIATION AS AMICUS CURIAE

Pursuant to Rule 42 of the Rules of this Court, the Pharmaceutical Manufacturers Association (PMA) hereby moves this Court for leave to file a single brief as *amicus curiae* in the above-captioned consolidated cases. The Solicitor General and counsel for Ciba Corporation, Bentex Pharmaceuticals, Inc. and USV Pharmaceutical Corporation have all consented to the filing of the attached brief at the time respondents' briefs are due.

Copies of the letters of these counsel consenting to the filing of this brief have been filed with the Clerk of the Court. The consent of counsel for Hynson, Westcott & Dunning, Inc., respondent in No. 72-394 and petitioner in No. 72-414, was requested but refused on the ground that PMA intended to take a position inconsistent with that of Hynson, Westcott & Dunning in No. 72-414. Hynson, Westcott & Dunning will in no way be prejudiced by the filing of PMA's brief at this time, however, since it will have an opportunity to file a reply brief in No. 72-414.

The interest of PMA as *amicus curiae* is set forth at pages 1-2 of the attached brief.

Respectfully submitted,

LLOYD N. CUTLER

DANIEL MARCUS

900 - 17th Street, N.W.
Washington, D. C. 20006

Attorneys for Pharmaceutical Manufacturers Association, Amicus Curiae

April 2, 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-394, 72-414, 72-528, 72-555, 72-666

CASPER W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, AND CHARLES C. EDWARDS, COMMISSIONER OF FOOD AND DRUGS,

Petitioners,

v.

HYNSON, WESTCOTT & DUNNING, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

AND CONSOLIDATED CASES

BRIEF FOR PHARMACEUTICAL MANUFACTURERS ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Pharmaceutical Manufacturers Association (PMA) is a voluntary, nonprofit membership association com-

posed of more than 100 companies which account for approximately 95% of the production of prescription and ethically promoted over-the-counter drugs in the United States. PMA has often represented the interests of its member companies in both administrative and judicial proceedings.[1]

The cases now before this Court raise important issues about the correct construction and application of the provisions of the Federal Food, Drug, and Cosmetic Act dealing with "new drugs." PMA's member companies have a direct and vital interest in the resolution of those issues. PMA believes that it can assist the Court by presenting in a single *amicus* brief the views of the nation's manuufacturers of prescription and ethically promoted over-the-counter drugs on the complex and important issues at stake in these cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issues presented by the cases now before this Court concern the provisions of the Federal Food, Drug, and Cosmetic Act dealing with "new drugs." Under the statute, it is illegal to market a "new drug" without approval of a new drug application (NDA) by the Food and Drug Administration (FDA). Sections 301(d), 505(a), 21 U.S.C. §§ 331(d), 355(a). From 1938 until 1962, this required a showing that the drug was safe for its recommended uses. Section 505, 52 Stat. 1052 (1938). Since 1962, the Act has required an additional showing of efficacy, based on a statutorily defined standard of "substantial evidence of effectiveness." Sections 505(d) and (e), 21 U.S.C. §§ 355(d) and (e).

---

[1] See, *e.g.*, *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 156-57 n.20 (1967); *Pharmaceutical Mfrs. Ass'n* v. *Gardner*, 381 F.2d 271 (D.C. Cir. 1967); *Pharmaceutical Mfrs. Ass'n* v. *Richardson*, 318 F. Supp. 301 (D. Del. 1970).

However, under the statute not all drugs are "new drugs." From 1938 until 1962 a "new drug" was defined as one that was "not generally recognized as safe" by qualified experts. Section 201(p), 52 Stat. 1041 (1938). Since 1962, a "new drug" has been defined as one "not generally recognized as safe and effective" by qualified experts. Section 201(p), 21 U.S.C. § 321(p). Moreover, when Congress in 1962 amended both the "new drug" definition and Section 505 of the Act to include a new efficacy requirement, it enacted a "grandfather" provision permanently exempting certain products then on the market from the amendments to the "new drug" definition. 76 Stat. 788-89, note following 21 U.S.C. § 321.

Thus, the basic scheme created by the statute carefully distinguishes between "new drugs" and drugs that are not "new"—the latter being often referred to as "old" drugs. The cases now before this Court reflect the efforts of the FDA to transfer from the courts to the agency authority to determine whether a product is a "new drug," to sweep virtually all products into the "new drug" category, and to dispense with hearing rights in connection with proceedings to withdraw approval of new drug applications. As we will show in this brief, these efforts by the FDA are flatly inconsistent with the statute and are unnecessary to assure its effective implementation.

I.

The question of the FDA's authority to withdraw approval of a new drug application for lack of substantial evidence of effectiveness without providing a hearing on disputed, material issues of fact is presented in *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, No. 72-397. Section 505(e) of the statute, governing proceedings to withdraw approval of NDA's, provides the affected manufacturer a right to a hearing. A hearing, there-

fore, must be held whenever there is a genuine dispute as to material facts—*i.e.*, in this context, whenever a manufacturer sufficiently alleges facts which, if true, would support a finding of substantial evidence of effectiveness for the product in question. Where such a factual dispute exists, the Commissioner of Food and Drugs may not resolve that dispute before the hearing and invoke his resolution of the issue as his reason for denying a hearing. Moreover, under well-established principles of summary judgment procedure, the burden of establishing the lack of a material factual dispute is clearly on the Commissioner, as the party moving for summary judgment.

The FDA's hearing regulations purport to embody judicial summary judgment principles, and have been upheld by the courts only on that basis. The Fourth Circuit correctly set forth and applied those principles in its *Hynson, Westcott & Dunning* decision. In arguing that that decision was incorrect, the Government has blurred the distinction between the test for determining the issue of substantial evidence of effectiveness on the merits at a hearing and the test for determining whether the Commissioner is entitled to award himself summary judgment on that issue without a hearing. In so arguing, the Government has demonstrated that, despite the language of its regulations, the FDA's continued intention is to decide disputed questions as to the existence of substantial evidence of effectiveness in advance of a hearing and, on the basis of such findings, to determine that no hearing is necessary. Under such a regime, the right to a hearing guaranteed by the statute would be effectively, and illegally, obliterated.

II.

On the second major issue presented by these cases—whether the FDA has authority to make binding determinations whether a product is a "new drug"—there

is a conflict between the circuits. In *Ciba Corporation* v. *Weinberger*, No. 72-528, the Third Circuit affirmed the district court's refusal to issue a declaratory judgment on the "new drug" status of a product on the ground that the issue had been decided by the FDA, *sub silentio*, in a proceeding to withdraw approval of the NDA for the product. In *Weinberger* v. *Bentex Pharmaceuticals, Inc.*, No. 72-555, the Fourth Circuit reached the opposite result, holding that it was improper for a district court to defer to the FDA's judgment on the "new drug" question, since the FDA had no authority under the statute to make such determinations. The Fourth Circuit followed its *Bentex* decision on the same issue in *Hynson, Westcott & Dunning, Inc.* v. *Weinberger*, No. 72-414, and in *USV Pharmaceutical Corp.* v. *Weinberger*, No. 72-666.

This conflict between the circuits should be resolved in favor of the carefully reasoned opinion of the Fourth Circuit in *Bentex*. The Food, Drug, and Cosmetic Act itself defines the term "new drug" (Section 201(p)), and makes it a prohibited act to market a "new drug" without a new drug application approved by the FDA. Sections 301(d), 505(a). But nowhere in the statute is the FDA given any authority to determine whether a product is a "new drug"; its only authority under the new drug provisions (Section 505) of the statute is to approve or disapprove a new drug application.

This does not make for an irrational or ineffective legislative scheme. A manufacturer who markets a product without an approved NDA in the face of the FDA's opinion that the product is "new" does so at his own risk—the very serious risk under Title III of the Act of seizure of the product or an action seeking an injunction against its marketing or even criminal penalties. This is consistent with the general scheme of the statute—reflected in the basic adulteration and misbranding provisions—under which standards of conduct are set forth

in the statute itself, with violations of those standards determined in judicial enforcement actions brought by the Government at the behest of the FDA.

Moreover, there is no basis for any suggestion that resolution of the "new drug" issue by the courts in declaratory judgment and enforcement actions is either novel or unduly difficult and burdensome. The fact is that the courts have been resolving these issues for many years without any perceptible difficulty or burden. In arguing that the question whether a product is a "new drug" is unduly complex and technical for a court, the Government ignores the critical distinction between that question and the question resolved by the FDA in determining whether or not to grant or continue approval of a new drug application. The test for approval of an NDA is actual safety and effectiveness, and requires a careful analysis of all relevant scientific evidence, including clinical tests. The question whether the product is a "new drug," by contrast, turns on whether the product is *generally recognized* as safe and effective. The latter issue has lent itself well to judicial determination.

The Government's bootstrap efforts to imply FDA authority to resolve the "new drug" issue in the course of passing on NDAs or, in other contexts, by issuing declaratory orders, founder on the simple and inescapable fact that the statutory scheme created by Congress deliberately allocates to the courts the decision whether a product is a "new drug." In the last analysis, the Government is seeking no less than an amendment of the basic structure of the statute—a result that it should not be permitted to achieve by litigation.

III.

When Congress enacted the 1962 Drug Amendments to require that "new drugs" be shown to be effective as well as safe, it also enacted a "grandfather" clause per-

manently exempting from the new effectiveness requirement certain products already on the market, so long as they continued to be recommended for the same uses. Section 107(c)(4) of the 1962 Amendments permanently exempts any such product that "on the day immediately preceding the enactment date (A) was commercially used or sold in the United States, (B) was not a new drug as defined by section 201(p) of the basic Act as then in force, and (C) was not covered by an effective application under section 505 of that Act." 76 Stat. 789, note following 21 U.S.C. § 321.

In *USV Pharmaceutical Corp.* v. *Weinberger*, No. 72-666, the Fourth Circuit held that any drug that had *ever* been the subject of an NDA did not qualify for grandfather protection under Section 107(c)(4), even if it had become generally recognized as safe by 1962—unless the FDA had formally withdrawn approval of the NDA. At the same time, the Fourth Circuit held that so-called "me-too" products of other manufacturers, substantially identical in composition to the NDA'd "pioneer" product but never the subject of NDAs themselves, could qualify for grandfather protection. In this Court, the Government supports the Fourth Circuit's position on once-NDA'd products but argues that all me-too products should also be deemed to be "covered" by the NDA for the product to which they are similar.

Both the Fourth Circuit and the Government have construed Section 107(c)(4) arbitrarily and illogically. Properly construed, Section 107(c)(4) grandfathers any product that on the day before the effective date of the 1962 Amendments was generally recognized as safe and therefore no longer a "new drug." There is no meaningful sense in which a product no longer "new" can be said to be "covered by an effective NDA."

This construction of the grandfather clause gives effect to the fundamental legislative purpose underlying

the enactment of the new effectiveness requirements in 1962—that entirely new products and new claims for old products were to be subjected to the new effectiveness requirement, but that existing claims for old products were to be exempted. The construction urged by the Government, by contrast, would render Section 107(c)(4) entirely meaningless. Every drug first marketed between 1938 (when the "new drug" provisions were first enacted) and 1962 must at some time have been a "new drug" which could not lawfully have been marketed without an effective NDA. And under the Government's view, an NDA once effective is always effective and covers all me-too drugs. Accordingly, if the Government's position were adopted, no drug first marketed between 1938 and 1962 could meet the test of Section 107(c)(4), and that section would have no function whatever.

In its *USV* decision the Fourth Circuit recognized the plausibility of the argument advanced here that a drug that is no longer "new" should not be considered to be "covered" by an effective NDA. It rejected the argument solely on the ground that it would make surplusage out of the requirement of clause (C) of Section 107(c)(4) that the product not have been covered in 1962 by an effective NDA. This ground for decision cannot stand. For on analysis it becomes clear that clause (C) is equally surplusage both under the interpretation of the grandfather clause adopted by the Fourth Circuit and under the interpretation proposed by the Government. Since Section 107(c)(3) of the 1962 Drug Amendments makes clear that all drugs covered by an effective NDA are not permanently grandfathered (but were subjected to the new effectiveness requirement after a two-year grace period), Section 107(c)(4), *even without clause (C)*, could apply only to old drugs not covered by an effective NDA.

In short, the "surplusage" objection is equally applicable to the positions of the Government and the Fourth Circuit as it is to the argument contended for here. In-

deed, since Section 107(c)(3) governs all drugs that are covered by effective NDAs, there is no construction of Section 107(c)(4) under which clause (C) is not surplusage. Under the circumstances, this Court should adopt the interpretation of Section 107(c)(4) that gives it a meaningful function, that accords with the fundamental legislative purpose, and that avoids distinctions between NDA'd and me-too products. It should therefore hold that any drug that was generally recognized as safe on the day before the enactment of the 1962 Amendments cannot be considered to have been covered by an effective NDA on that date and is therefore grandfathered as to pre-1962 claims by Section 107(c)(4).

ARGUMENT

I. A Manufacturer is Entitled to a Hearing on any Genuine Issue of Material Fact Before Withdrawal of Approval of a New Drug Application.

Weinberger v. *Hynson, Westcott & Dunning, Inc.*, No. 72-394, raises the question whether the Commissioner may withdraw approval of a new drug application (NDA) for lack of substantial evidence of effectiveness, thus halting further marketing of a drug, without giving the manufacturer a hearing on disputed, material factual issues. The Fourth Circuit held that the Commissioner may not apply his "summary judgment" regulations[2] so as to deny a hearing where a manufacturer alleges and offers appropriate proof of facts which, if true, would support a finding of substantial evidence of effectiveness. *Hynson, Westcott & Dunning, Inc.* v. *Richardson*, 461 F.2d 215 (4th Cir. 1972) (J.A. 173).[3] That holding is clearly correct.

This Court has recognized as a fundamental aspect of due process of law that a person has a right to a

[2] 21 C.F.R. § 130.14.

[3] "J.A." refers to the Joint Appendix filed in these consolidated cases.

hearing in advance of a decision by an administrative agency resolving disputed factual questions affecting his substantial rights. Due process entitles him to an opportunity to present his case on disputed issues, to confront the Government's case, and to cross-examine its witnesses. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970). This is true not only where personal rights are at stake[4] but also where property rights are involved.[5]

The Food, Drug, and Cosmetic Act recognizes this constitutional principle by providing a hearing in a number of contexts to persons whose rights would be substantially affected by Government actions under the Act. *E.g.*, §§ 505(e), 507(f), 701(e), 21 U.S.C. §§ 355(e), 357(f), 371(e). Section 505(e) of the Act, which is involved in this case, guarantees "due notice and opportunity for hearing to the applicant" before the FDA may withdraw approval of an NDA. It reflects Congress' judgment that an opportunity for a hearing is appropriate before the FDA takes the drastic action of halting the manufacturer's further sale and the public's continued use of a drug already on the market.[6]

---

[4] See, *e.g.*, *Bell* v. *Burson*, 402 U.S. 535, 539-42 (1971); *Boddie* v. *Connecticut*, 401 U.S. 371, 374-79 (1971).

[5] See, *e.g.*, *Greene* v. *McElroy*, 360 U.S. 474, 496-99 (1959) and cases cited at p. 497; *Morgan* v. *United States*, 304 U.S. 1, 14-15, 19 (1938); *ICC* v. *Louisville & Nashville R. Co.*, 227 U.S. 88, 93-94 (1913); *Hornsby* v. *Allen*, 326 F.2d 605, 608 (5th Cir. 1964); *Philadelphia Co.* v. *SEC*, 175 F.2d 808, 817 (D.C. Cir. 1948), *vacated as moot*, 337 U.S. 901 (1949). See generally K. DAVIS, ADMINISTRATIVE LAW §§ 7.01, 7.04 (Supp. 1970). Indeed, this Court based its holding in *Goldberg* v. *Kelly*, *supra*, on earlier business cases.

[6] The legislative history of the 1962 Amendments makes plain that Congress regarded an "opportunity for hearing" as required by basic fairness before the drastic action of removal of a drug from the market. Section 507(f), which authorizes removal of anti-

A summary judgment procedure does not carve out an exception to this right to a hearing. It merely recognizes that an evidentiary hearing is unnecessary where the material facts are not in dispute. See, *e.g.*, K. DAVIS, ADMINISTRATIVE LAW §§ 7.01, 7.04 (Supp. 1970); 6 J. MOORE, FEDERAL PRACTICE ¶ 56.06 (2d ed. 1972). The leading decision on hearing rights under the Food, Drug, and Cosmetic Act recognizes that the permissibility of denying a hearing hinges on the absence of any disputed issues of material fact. *Dyestuffs & Chemicals, Inc.* v. *Flemming*, 271 F.2d 281 (8th Cir. 1959), *cert. denied*, 362 U.S. 911 (1960). The court held that the FDA might deny a hearing (under Section 701(e) of the Act) where a manufacturer's allegations, even if true, would be legally insufficient to justify the relief sought. In other words, the factual issues raised by the objections had to be *material* issues—ones that went to the legality of the FDA's proposed action.[7]

---

biotics from the market for lack of substantial evidence of effectiveness, does not, like Section 505(e), provide for a hearing in unqualified terms but provides for a hearing if the manufacturer states "reasonable grounds" for one. 21 U.S.C. § 357(f). Yet, in explaining Section 507(f), Senator Kefauver, chief sponsor of the 1962 Amendments, stated:

> "There of course would be public procedure with an opportunity for hearings and judicial review afforded the drug manufacturers before the FDA began this type of action." 108 CONG. REC. 22039 (1962).

[7] In the *Dyestuffs* case, it had already been established by a Supreme Court decision (*Flemming* v. *Florida Citrus Exchange*, 358 U.S. 153 (1958)) that, as a matter of law, color additives that were toxic at any level of concentration were not "harmless" and were legally barred from certification. The manufacturer's objections to the decertification order in *Dyestuffs* advanced several reasons for permitting the use of the additives in question, but did not allege that the additives met the legal test of harmlessness. Since it was clear that the manufacturer's objections were legally irrelevant, the court ruled that the FDA was justified in not holding a hearing that could not affect the FDA's final decision. See also *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956); *FPC* v. *Texaco, Inc.*, 377 U.S. 33, 39 (1964).

The *Dyestuffs* decision reflects the basic principle embodied in the familiar summary judgment procedure of Rule 56 of the Federal Rules of Civil Procedure and the cases applying that rule: A party's right to a hearing turns on the existence of a disputed issue of fact bearing on his right to relief under applicable law. "The question presented by a motion for summary judgment is whether or not there is a genuine issue of fact, and not how that issue should be determined." 6 J. MOORE, *supra*, ¶ 56.11[3], at 2174, quoting *Koepke* v. *Fontecchio*, 177 F.2d 125, 127 (9th Cir. 1949). See also *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, 130 F.2d 1016, 1018 (3rd Cir. 1942).

The FDA may not, in deciding on the need for a hearing under Section 505(e), resolve genuine factual disputes concerning the existence of substantial evidence of effectiveness:

> "Summary judgment procedures . . . do not replace the trial. Genuine and disputed questions are not to be decided on the paper record of affidavits and depositions . . . ." *Clayton* v. *James B. Clow & Sons*, 154 F. Supp. 108, 112 (N.D. Ill. 1957).

Professor Moore has stressed this point in summarizing the law under Rule 56:

> "The court is authorized to examine proffered materials extraneous to the pleadings, not for the purpose of trying an issue, but to determine whether there is a genuine issue of material fact to be tried." 6 J. MOORE, *supra*, ¶ 56.04, at 2060. See also *id.*, ¶ 56.11 [1.-2], at 2145; *id.*, ¶ 56.15, at 2281.

Nor may the FDA place the burden of establishing that there *are* genuine factual disputes on the manufacturer. Under well-settled principles, the Commissioner has the burden of establishing that there is no factual issue requiring a hearing, and all doubts about the

existence of a factual issue must be resolved against him. This is true regardless of who has the final burden of proof on the issue of substantial evidence of effectiveness of the drug.* "[T]he burden to show that there is no genuine issue of material fact rests on the party moving for summary judgment, whether he or his opponent would at trial have the burden of proof on the issue concerned; and rests on him whether he is by it required to show the existence or non-existence of facts." 6 J. MOORE, *supra*, ¶ 56.15[3], at 2342-43 (footnotes omitted). See also *id.* at 2335. This Court has stressed that, since the burden rests on the moving party, the materials on which he relies "must be viewed in the light most favorable to the opposing party." *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 157, 158-59 (1970); *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962). "All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment." *Cameron* v. *Vancouver Plywood Corp.*, 266 F.2d 535, 540 (9th Cir. 1959); see 6 J. MOORE, *supra*, ¶ 56.06[2], at 2080; ¶ 56.11[3], at 2170 & n.27; ¶ 56.15[3].

This rule is particularly important where, as here, the critical decision whether there is a genuine issue of material fact requiring a trial is not made by a neutral trier of fact (such as an independent hearing examiner or administrative judge) but by one of the antagonists—the Commissioner, who is the very party seeking sum-

* The lower federal courts have concluded that the applicant has the burden of establishing the efficacy and safety of his drug when he seeks initial approval of an NDA. See *Ubiotica Corp.* v. *FDA*, 427 F.2d 376, 378 (6th Cir. 1970). However, contrary to the Government's assertion (Brief for Petitioners in No. 72-394, at 27), the burden shifts once a drug has begun to be marketed under an approved NDA. Where the FDA seeks to withdraw a previously granted approval, it has the burden of showing that the drug does not meet the statutory tests. *Bell* v. *Goddard*, 366 F.2d 177, 181 (7th Cir. 1966).

mary judgment. The Commissioner, under his procedural rules, is allowed to award summary judgment to himself. Under these circumstances, courts have a special duty to review most carefully how the Commissioner, acting as both movant and judge, decides his own motion in his own favor.[9]

The courts have confirmed that this elementary burden-of-proof rule applies when summary judgment is sought in an administrative proceeding as well as in a court action. See, *e.g.*, *NLRB* v. *Smith Industries, Inc.*, 403 F.2d 889, 892-95 (5th Cir. 1968). Indeed, the Court of Appeals for the District of Columbia Circuit has applied the rule to proceedings for withdrawal of NDA approvals. In *USV Pharmaceutical Corp.* v. *Secretary of Health, Education & Welfare*, 466 F.2d 455, 461 (D.C. Cir. 1972), it held that the rule is "basic to ad-

[9] Indeed, a strong argument could be made that, in adapting the summary judgment procedure to the context of an administrative proceeding, the FDA ought to have a neutral hearing examiner initially decide whether there is a genuine issue of material fact. Under the FDA's regulations, hearings on withdrawals of approval of NDAs are conducted not by the Commissioner but by an independent hearing examiner appointed pursuant to Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(d). 21 C.F.R. § 130.17. Fairness would dictate that the function of deciding whether a triable issue of fact exists should also be assigned initially to the hearing examiner.

The Administrative Conference of the United States has recommended that agencies adopt a summary judgment procedure under which the decision to grant summary judgment would be made by the "presiding officer," not by the moving party. Administrative Conference of the United States, Recommendation No. 20 (adopted June 1970). A commentary prepared by the draftsmen of the recommendation does not even consider entrusting the authority to grant summary judgment to anyone but the hearing officer. Gellhorn & Robinson, *Summary Judgment in Administrative Adjudication*, 84 HARV. L. REV. 612 (1970). If the FDA's procedure followed the Administrative Conference recommendation, it would avoid the evident unfairness of permitting the Commissioner, as an interested party, to pass in the first instance on his own motion for summary judgment.

ministrative fairness" and is fully applicable to withdrawal proceedings under Section 505(e). In that case, the court invalidated the FDA's withdrawal of approval of three NDAs because, *inter alia*, the Commissioner had failed to meet his "obligation to present at least a prima facie case for denial of a hearing." *Id.* The Government, which did not seek review of that decision by this Court,[10] now takes issue with this aspect of the decision, or at least suggests that the Commissioner should have been permitted to rely on the NAS-NRC reports to make out his *prima facie* case. Brief for Petitioners in No. 72-394, at 32 n.22.[11] However, even assuming that a negative NAS-NRC report is sufficient in some circumstances to shift the burden to the manufacturer to come forward with the evidence on which he relies, that does not affect the burden of persuasion on summary judgment. The Commissioner retains the burden of showing that the facts alleged by the manufacturer—if true—could not support a finding of substantial evidence of effectiveness.

The regulations involved in the *Hynson, Westcott & Dunning* case are expressly modeled after Rule 56 of the Federal Rules of Civil Procedure. See 35 Fed. Reg. 7251 (1970) (preface to adoption of rules). They permit a hearing to be denied only if the manufacturer's factual claims are facially incapable of meeting the legal test for continued approval—that is, only

> "[*w*]*hen it clearly appears* from the data in the application and from the reasons and factual analysis in the request for the hearing *that there is no genuine and substantial issue of fact* which pre-

[10] Memorandum for Respondents on Petition for Certiorari in No. 72-666, at 4.

[11] The D. C. Circuit noted that the NAS-NRC reports relied upon by the Commissioner in that case were "cryptic and conclusory, without any statement of supporting facts." 466 F.2d at 461. That defect is typical of the reports of the NAS-NRC panels. See, *e.g.*, J.A. 196-97.

> cludes . . . the withdrawal of approval of the application. . . ." 21 C.F.R. § 130.14(b) (emphasis added).

The lower federal courts have upheld these regulations only after construing them to incorporate the basic summary judgment principles discussed above. *Ciba-Geigy Corp.* v. *Richardson*, 446 F.2d 466, 468 (2d Cir. 1971); *USV Pharmaceutical Corp.* v. *Secretary of Health, Education & Welfare*, 466 F.2d 455, 460-61 & n.5 (D.C. Cir. 1972); *Pharmaceutical Mfrs. Ass'n* v. *Richardson*, 318 F. Supp. 301, 311-13 (D. Del. 1970); *cf. Upjohn Co.* v. *Finch*, 422 F.2d 944, 955, 960 (6th Cir. 1970). Indeed, the regulations had their genesis in two federal court decisions which condemned previous attempts by the Commissioner to require a manufacturer to prove the merits of its factual contentions in order to obtain a hearing. *American Home Prods. Corp.* v. *Finch*, 303 F. Supp. 448, 454 (D. Del. 1969); *Upjohn Co.* v. *Finch*, 303 F. Supp. 241, 257-58 (W.D. Mich. 1969).[12]

When the regulations were issued, PMA wrote to the Commissioner, attempting to obtain assurance that he intended to apply the regulations in accord with their apparent recognition that a manufacturer is entitled

---

[12] In *American Home*, the Commissioner had revoked his approval of an antibiotic under Section 507 of the Act without a hearing, even though the manufacturer had made factual assertions which the court found were "not 'frivolous,' 'inconsequential' or 'legally insufficient,'" 303 F. Supp. at 454, 456. The court enjoined the Commissioner's action, stating:

> "It appears to this Court that the Commissioner may have made the test of substantial evidence of effectiveness—the showing required to justify continued certification of the drug—the test of whether the [manufacturer] is entitled to a hearing. . . .
>
> "My reading of the *Dyestuffs* case and interpretation of the statutory scheme provided by § 507(f) of the Act indicates that 'reasonable grounds' [for a hearing] should be understood as meritorious, non-frivolous objections, which could most appropriately be resolved finally after a full hearing." *Id.* at 454.

to a hearing on any genuine issue of material fact. PMA's letter posed the question whether, under the regulations, a manufacturer would be granted a hearing if he presented one or more affidavits by qualified experts, summarizing the clinical tests and concluding that some of them met the criteria in the regulations for "adequate and well-controlled" tests and that, either alone or together with other clinical evidence, they sufficiently established the effectiveness of the drug.[13] The Commissioner's answer was noncommittal and unclear.[14] For

[13] The full text of PMA's question was as follows:

"Assume that a party affected by a proposed withdrawal of a new drug application or repeal of an antibiotic regulation presents, in his request for a hearing, one or more affidavits by experts qualified by scientific training and experience to evaluate the effectiveness of the drug involved. These affidavits summarize the clinical tests conducted and conclude that some of them meet the criteria set forth in Section 130.12(a) (5) (ii) (*a*) and that, either alone or together with other clinical evidence, they adequately establish the effectiveness of the drug. If you were to disagree as to either point, would you still rule that there is a genuine and substantial issue as to the existence of substantial evidence and, therefore, that a hearing was required?" Letter from C. Joseph Stetler, President, Pharmaceutical Manufacturers Association, to Charles C. Edwards, M.D., Commissioner of Food and Drugs, dated June 3, 1970, attached as Exhibit 5 to the Complaint in *Pharmaceutical Mfrs. Ass'n* v. *Richardson*, Civ. No. 3946 (D. Del., filed July 22, 1970).

[14] The Commissioner responded as follows:

"First, opinion evidence in an affidavit could not provide a basis for determining whether there is substantial evidence derived from adequate and well-controlled clinical investigations. This determination would have to be made upon the basis of an examination of the medical documentation offered. What the regulations require is that the request for a hearing contain a well-organized factual discussion of the available data, in sufficient detail to allow a medical judgment as to the conclusions that may properly be drawn from the data. If the medical documentation contains no substantial evidence, even when accepted at face value, there is no issue of fact for a hearing. But if this factual analysis identifies studies meeting the criteria for adequate and well-controlled studies which appear

that reason, PMA brought suit, arguing that the regulations were invalid if construed to permit the Commissioner to resolve disputed issues of fact as a basis for denying a hearing. *Pharmaceutical Mfrs. Ass'n* v. *Richardson, supra.*

During the oral argument in that suit, counsel for the Commissioner gave the district court the assurances that the Commissioner failed to give in response to PMA's letter. He stated that, under the regulations,

> "where there are legitimate differences of opinion about adherence to those criteria then you have disputed issues of fact which call for a hearing. . . . .
>
> ". . . The problem is and all the problem is that we are dealing here with applications which *fail to show on their face* that they gave attention to these issues." [15]

After receiving these assurances, the district court upheld the regulations on the ground that they followed the principles of Rule 56. The court held that the regulations "simply provide that a request for an evidentiary hearing will be denied *when it clearly appears* that the medical documentation, which the hearing applicant is required to submit, *shows on its face* that there is no

---

to support the promotional claims, a hearing may be unnecessary because the claims are proven, or a hearing may be required to test the validity of what has been reported by the investigator and the significance of his observations in providing a basis of fact upon which it could reasonably be concluded by experts that the drug will have the effectiveness claimed for it." Letter from Charles C. Edwards, M.D., Commissioner of Food and Drugs, to C. Joseph Stetler, President, Pharmaceutical Manufacturers Association, dated July 8, 1970, attached as Exhibit 6 to the Complaint in *Pharmaceutical Mfrs. Ass'n* v. *Richardson*, Civ. No. 3946 (D. Del., filed July 22, 1970).

[15] Transcript of Argument at 33, 26, *Pharmaceutical Mfrs. Ass'n* v. *Richardson*, Civ. No. 3946 (D. Del., Oct. 2, 1970) (emphasis added). A copy of the full transcript is being lodged with the Clerk of this Court.

genuine and substantial issue of fact which precludes withdrawal of the new drug approval . . . ." 318 F. Supp. at 312. The court further observed:

> "Of course, if a given request for an evidentiary hearing were to raise an issue of genuine fact within the regulations, and the Commissioner were to misapply the rules, that would be subject to correction by the Courts." *Id.* at 313.

What facts must a manufacturer offer to prove to establish his right to a hearing? Under Section 505(e), the test for continued approval of an NDA is whether there is "substantial evidence" supporting the drug's efficacy. 21 U.S.C. § 355(e). "Substantial evidence" is defined in Section 505(d) to mean

> "evidence consisting of adequate and well-controlled investigations, including clinical investigations, by experts qualified to evaluate the effectiveness of the drug involved, on the basis of which it could fairly and responsibly be concluded by such experts that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the labeling or proposed labeling thereof." 21 U.S.C. § 355(d).

Whether the evidence supporting a particular NDA satisfies each element of this definition is a question of fact. See S. REP. No. 1744, 87th Cong., 2d Sess. pt. 2, at 6 (1962).

The Commissioner's regulations elaborate on the statutory definition, setting forth criteria for determining whether an investigation is "adequate and well-controlled." 21 C.F.R. § 130.12(a)(5)(ii). However, virtually all of those criteria are imprecise and judgmental. They call, *inter alia*, for "adequate assurance" that "suitable" subjects were chosen for the study; grouping of subjects "in such a way as to minimize" bias; comparison with a control "in such a fashion as to permit" quantitative evaluation; and determination of whether placebo

effect is "negligible". These are not "bright line" tests whose satisfaction will always be as readily apparent as whether the license applicant in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), already owned five radio stations. Expert opinions may differ about whether any one of the criteria is met in a particular case.[16]

Experts may differ also about whether particular studies form a basis for a conclusion of effectiveness. Indeed, the judgmental nature of these questions is the very reason for the "substantial evidence" test: Congress intended to allow for subjective differences of opinion among qualified experts and to permit a drug to be marketed even though a *minority* of the experts judge that its effectiveness has been appropriately demonstrated.[17] Where the manufacturer offers the opinion of a qualified expert that a certain study or group of studies meets the criteria for an "adequate and well-controlled investigation" and establishes the effectiveness of a product, a genuine factual dispute is presented. That dispute can be resolved only through confrontation and cross-examination at an evidentiary hearing. The Commissioner may not weigh the manufacturer's documentation against the views of his own experts and decide the merits of the

---

[16] It is possible to conceive of a situation in which even the "bright line" test involved in *Storer* might give rise to a factual dispute—for example, where the parties disagree whether the license applicant's relationship to an existing station amounts to ownership. However, the five-station rule obviously leaves little room for differences of opinion, and no factual dispute was even alleged to exist in *Storer*. Similarly, in *FPC* v. *Texaco, Inc.*, 377 U.S. 33 (1964), the agency's rules specifically forbade certain price clauses in natural gas contracts, and the companies did not deny that their contracts contained the forbidden clauses. Therefore, the Government's heavy reliance on *Storer* and *Texaco* (Brief for Petitioners in No. 72-394, at 22-24, 26) simply misses the point of those cases.

[17] S. REP. No. 1744, 87th Cong., 2d Sess. 16 (1962); *id.*, pt. 2, at 5-6, 56-58; 108 CONG. REC. 10108 (1962) (remarks of Sen. Hruska); *id.* at 17366 (remarks of Sen. Eastland).

manufacturer's claims as the basis for granting himself summary judgment.[18]

The decision below in the *Hynson, Westcott & Dunning* case correctly set forth and applied these principles. The court of appeals held that the Commissioner's summary judgment in favor of himself could be supported

> "only if it can be fairly said that the clinical tests and medical studies and investigations submitted by the applicant, if credited and accepted, will not support a finding that they provide 'substantial evidence' of effectiveness [under the statute and regulations] . . . .
>
> . . . Manifestly, the applicant does not have to satisfy or convince the Commissioner by his evidence that his product is effective as a predicate for securing his right to a hearing. If that were his burden, a hearing would never be necessary or appropriate." 461 F.2d at 220 (J.A. 178).[19]

---

[18] Of course, the necessary content and specificity of the expert's affidavit will depend on the facts of a particular case. The courts in cases under Rule 56 have developed a body of standards governing the adequacy of affidavits for use on summary judgment. See 6 J. MOORE, *supra*, ¶ 56.22.

[19] While the court of appeals' opinion is imprecise at points, we believe that this passage and the opinion as a whole make clear that the court applied the correct test. The Government criticizes the court of appeals for at one point characterizing the issue to be resolved at the hearing as "the effectiveness of Lutrexin." 461 F.2d at 221 (J.A. 180). The Government seizes upon this one phrase to argue that the court disregarded the test of "substantial evidence" as defined in the Act and regulations. Brief for Petitioners in No. 72-394, at 26-27. However, the remainder of the opinion makes clear that the court used the phrase "the effectiveness of Lutrexin" as a shorthand description of the statutory test. The test for approval of an NDA *is* the actual effectiveness (and safety) of a drug, as contrasted to the test for the applicability of the "new drug" provisions, which is *general recognition* of effectiveness (and safety). (See pp. 32-34, *infra*.) The substantial evidence requirement merely defines the type and quantity of evidence on which the determination of effectiveness depends. The Fourth Circuit's opinions in *Hynson, Westcott & Dunning* and

The court examined the materials submitted by Hynson, Westcott & Dunning with its request for a hearing and concluded that they did not clearly show on their face a lack of substantial evidence. *Id.* at 221 (J.A. 179-80).

In its attack on the Fourth Circuit's opinion, the Government blurs the vital distinction between deciding whether there is a factual dispute that necessitates a hearing and deciding the merits of the factual dispute. The Government argues that the court of appeals should have upheld the denial of a hearing because the Commissioner, *ex parte*, had made "a reasonable *determination* that the studies fail to conform to the regulations." (Brief for Petitioners in No. 72-394, at 35 (emphasis added).) But that determination is one that the Commissioner could lawfully make only after a hearing; in making it here he decided the very factual questions that the hearing would address.

This is revealed by the Government's discussion of the reasons given by the Commissioner for rejecting the studies relied upon by Hynson, Westcott & Dunning. (*Id.* at 37-39.) For example, the Commissioner rejected one of the studies for the stated reason that "[t]he historical controls employed are inappropriate" (J.A. 76), even though the regulations permit the use of historical controls (J.A. 488-89) and the manufacturer offered the opinions of several experts that historical controls are the only possible type of control where the life or death of a fetus is involved. (J.A. 33-34, 37, 41, 44, 51, 55, 59.)[20] If the Commissioner disagreed with those experts

---

Bentex show that it fully understood these aspects of the statutory scheme.

[20] The Government criticizes the affidavit of Dr. Sadusk, former Medical Director of the FDA, for failing to state whether he considered the studies relied upon by Hynson, Westcott & Dunning to be "well-controlled." The court of appeals apparently misread his affidavit as addressed to that specific question. 461 F.2d at 221

that tests of Lutrexin using historical controls could be "well-controlled," obviously that disagreement framed a factual issue requiring a hearing.

Perhaps recognizing this, the Government now recharacterizes the Commissioner's objection as going to the adequacy rather than the appropriateness of the historical controls. (Brief for Petitioners in No. 72-394, at 38 n. 27.) But the Commissioner's action is no more defensible on that ground. Neither the regulations nor the Commissioner's decision shows in what way the use of historical controls was inadequate. Since the experts performing the studies obviously thought their controls were adequate, that question can be decided only after full exploration through cross-examination at a hearing. If the Commissioner is permitted to decide such disputes *ex parte*, without a hearing, the Government's statement that "formal hearings are not likely to be needed in many instances" (*Id.* at 20 n.15) will certainly prove true.[21]

The Government's argument concerning the standard of review of the Commissioner's denial of a hearing confirms that it believes the Commissioner can *decide* genu-

---

(J.A. 180). In fact, the Sadusk affidavit was addressed to the important question of the appropriateness of historical controls in tests of drugs intended to prevent premature labor and threatened abortions. (J.A. 59.) In attacking it, the Government disregards the other affidavits dealing with the specific studies, several of them by the authors of the studies themselves.

[21] Indeed, so far as we are aware, the FDA has not granted a hearing in any case since its "summary judgment" rules were promulgated in 1970.

For a recent example of the lengths to which the FDA will go to avoid holding a hearing, see 38 Fed. Reg. 6305, 6308 (March 8, 1973), denying a request for a hearing and withdrawing approval of Winthrop Laboratories' NDA for Alevaire notwithstanding the submission of seven affidavits of experts concluding that studies relied upon by the manufacturer constituted adequate and well-controlled studies as defined by the FDA's own regulations and proved the effectiveness of the product.

ine disputes on material issues of fact without a hearing, and then invoke this decision to support his determination that there is no need for a hearing. The Government argues that the Commissioner's summary judgment in favor of himself should be upheld if "supported by the evidence." (*Id.* at 34.) However, that is the test to be applied to a finding of fact made on the record of a hearing, not to a summary determination that no genuine issue of fact exists. See Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(E). After the Commissioner has heard conflicting scientific testimony, with the benefit of cross-examination,[22] his conclusions are entitled to the judicial deference embodied in a restricted scope of review. However, the question for the Commissioner in determining whether a hearing is needed is simply whether a material factual dispute exists. That question is one of law. *E.g.*, *NLRB* v. *Bata Shoe Co.*, 377 F.2d 821, 826 (4th Cir.), *cert. denied*, 389 U.S. 917 (1967). Once the Commissioner has decided it, "the appellate court in reviewing must determine whether there is any genuine issue of material fact underlying the adjudication." 6 J. MOORE, *supra*, ¶ 56.27[1], at 2973.[23]

Finally, the Government raises the spectre that it may have to hold thousands of hearings, thus bogging down the implementation of its review of the effectiveness of

---

[22] The Court of Appeals for the District of Columbia Circuit has recently reaffirmed the "unique potential" of cross-examination "as an 'engine of truth'—the capacity given a diligent and resourceful counsel to expose subdued premises, to pursue evasive witnesses, to 'explore' the whole witness, often traveling unexpected avenues." *International Harvester Co.* v. *Ruckelshaus* (D.C. Cir. No. 72-1517, Feb. 10, 1973), slip op. at 22.

[23] Summarizing the law under Rule 56, Professor Moore further stated: "The trial court cannot draw upon any discretionary power to grant summary judgment where [the] adjudication involves any genuinely disputed issue of material fact." *Id.* at 2976.

pre-1962 drugs. (Brief for Petitioners in No. 72-394, at 19, 30, 35.)[24] There are several answers to this argument. First, faithful application of summary judgment principles will mean no more than that a manufacturer will receive a hearing when it makes a concrete offer of proof on a material factual issue. The Government's fear that summary judgment will never be possible (*id.* at 35) disregards the years of successful use of summary judgment in the federal courts to weed out cases in which no factual dispute really exists. Second, though it would be faster and cheaper for FDA to proceed *ex parte*, Congress in providing for hearings obviously was willing to pay the price of guaranteeing the fairness that only hearings can provide.[25] Finally, the Government greatly exaggerates the size of the problem. In the recent *American Public Health Ass'n* litigation to which the Government refers,[26] the evidence indicated that a substantial majority of the drugs rated less than "effective" by the NAS-NRC panels have been voluntarily removed from the market and that many of the remainder are duplicates of each other, containing the same active ingredient.[27] The

---

[24] It is particularly ironic that this "burden" argument is advanced in a group of cases in which the Government is also asking this Court to vest the FDA with new authority to determine whether products are "new drugs" and to obliterate any "grandfather" protection for pre-1962 products, thus sweeping many additional products into the "new drug" regulatory scheme. See Points II and III, *infra*.

[25] This Court has recently noted the constitutional underpinning for that judgment: "While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process." *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 261, quoting *Kelly* v. *Wyman*, 294 F. Supp. 893, 901 (S.D. N.Y. 1968).

[26] *American Public Health Ass'n* v. *Veneman*, 349 F. Supp. 1311 (D.D.C. 1972), discussed in Brief for Petitioners in No. 72-394, at 30 n.20.

[27] Affidavit of John G. Adams, Ph.D., attached to Supplemental Memorandum in Support of Motion of Pharmaceutical Manufacturers Association for Leave to Intervene, *American Public*

number of cases requiring hearings can be expected to be a small fraction of the number of drug claims reviewed by the NAS-NRC panels.

In its *Hynson, Westcott & Dunning* decision, the Court of Appeals for the Fourth Circuit correctly set forth and applied the standard for determining whether a hearing must be held before approval of an NDA is withdrawn for lack of substantial evidence of effectiveness. That ruling should be affirmed by this Court.

II. Under the Food, Drug, and Cosmetic Act, the Courts Have Exclusive Jurisdiction, in Enforcement and Declaratory Judgment Actions, to Determine Whether a Product is a "New Drug."

Three of the cases before the Court are declaratory judgment actions brought by drug manufacturers seeking a judicial determination that certain of their products are not "new drugs" as that term is defined in the Act—either because the products are not "new" within the meaning of amended Section 201(p), 21 U.S.C. § 321(p), or because they were exempted from amended Section 201(p) by the "grandfather" provisions of the 1962 Drug Amendments. The Government has challenged the manufacturers' right to have a court make that determination, arguing that the decision is more properly made by the Commissioner, subject to normal judicial review of agency actions.

Health Ass'n v. *Veneman*, Civ. No. 1847-70 (D.D.C., filed Oct. 5, 1972). Specifically, Dr. Adams stated that in a survey of 681 drugs, manufactured by 47 PMA member companies, which had received no "effective" ratings, 428 had already been removed from the market. Thirty-six others had been accepted as "effective" by the FDA for one or more claims based on additional studies. The remaining 217 include only 152 distinct products, with the others being "obvious duplicates representing either different dosage forms or different strengths of the same active ingredient." *Id.* A copy of Dr. Adams' affidavit is being lodged with the Clerk of this Court.

In the *Bentex* case (No. 72-555), the Court of Appeals for the Fourth Circuit upheld the manufacturers' right to obtain a declaratory judgment on the "new drug" status of their products and rejected the Government's argument that FDA has concurrent jurisdiction to decide that question. *Bentex Pharmaceuticals, Inc.* v. *Richardson*, 463 F.2d 363 (4th Cir. 1972) (J.A. 258). The same court followed that ruling in the *USV* case (No. 72-666), decided the next day. *USV Pharmaceutical Corp.* v. *Richardson*, 461 F.2d 223, 226 (4th Cir. 1972) (J.A. 466).[28]

However, the Third Circuit reached the opposite result in No. 72-528. *Ciba Corp.* v. *Richardson*, 463 F.2d 225 (3d Cir. 1972) (J.A. 215). In a *per curiam* opinion which cited no authorities, the Third Circuit held that the question of "new drug" status had been decided *sub silentio* by the FDA when it withdrew approval of Ciba's previously approved NDA and by a court of appeals in upholding the FDA's action. Therefore, the Third Circuit concluded that Ciba was barred from obtaining a declaratory judgment on the question.[29]

---

[28] In *USV*, since there has been a trial in the district court and there are now no disputed issues of fact, the Government does not oppose this Court's reaching the legal issues governing the "new drug" status of the products involved. However, it does indicate its disagreement with the Fourth Circuit's ruling, based on *Bentex*, that those issues are for the courts, not FDA, to decide. See Memorandum for Respondents on Petition for Certiorari in No. 72-666 at 6 n.9.

[29] The remaining case before the Court (Nos. 72-394, 72-414) arises from the FDA's withdrawal of approval of an NDA, of which review was obtained directly in the court of appeals. *Hynson, Westcott & Dunning, Inc.* v. *Richardson*, 461 F.2d 215 (4th Cir. 1972) (J.A. 173). In that case, the manufacturer, having previously been refused a declaratory judgment on the status of its product (*Hynson, Westcott & Dunning, Inc.* v. *Finch* (D. Md., Civ. No. 21112, Sept. 16, 1970)), was also refused a hearing before the FDA on its claim of exemption from the "new drug" requirements. PMA believes that the district court's decision refusing to adjudicate the status of Hynson, Westcott & Dunning's product was erroneous.

For the reasons discussed below, we submit that this conflict between the circuits should be resolved in favor of the Fourth Circuit's carefully reasoned construction of the Act in *Bentex*.

As the *Bentex* opinion demonstrates, Congress has struck a balance in the Act between judicial and administrative authority for its implementation. This balance is reflected in the two major amendments of the federal drug laws since the original enactment of the Food and Drug Act of 1906. Act of June 30, 1906, 34 Stat. 768.

The 1906 Act did not provide for any premarketing review of drugs by an administrative agency. It prohibited the interstate sale of adulterated or misbranded drugs, and statutorily defined what acts constituted adulteration and misbranding. *Id.* §§ 7, 8, 34 Stat. 769-71. The agency was assigned the prosecutorial role of proceeding against violators in court.[30] When the Food, Drug, and Cosmetic Act replaced the earlier law in 1938, it carried forward these self-executing prohibitions—triable in the first instance by district courts—and added a requirement of premarketing administrative clearance for "new drugs." It defined "new drugs" as drugs "not generally recognized as safe" by qualified experts. Act of June 25, 1938, § 201(p), 52 Stat. 1041-42. The Act left manufacturers free to market drugs other than "new drugs" without the prior approval or acquiescence of an administrative agency, subject to the judicial sanctions of injunction, seizure, or criminal penalty if they violated any of the Act's commands—including the specific prohibition against marketing a "new drug" without an effective NDA. See Sections 301(d), 302-04, 505(a), 21

[30] Enforcement actions are actually brought in the name of the United States, by the Department of Justice. The administrative agency investigates possible violations and refers cases to the Department for prosecution. The term "prosecutorial role of the agency" is used in this brief to denote the agency's role in instigating enforcement suits.

U.S.C. §§ 331(d), 332-34, 355(a). Except for the FDA's authority to screen "new drugs" before marketing, the function of the agency under the Act remained prosecutorial.

The 1962 Amendments to the Act, which expanded the definition of "new drugs" to include drugs "not generally recognized as safe *and effective*" and elaborated on FDA's controls over "new drugs" under Section 505 of the Act, did not change the balance between the self-executing and the premarketing clearance aspects of the Act. Pub. L. 87-781, §§ 102-04, *amending* Sections 201(p), 505, 21 U.S.C. §§ 321(p), 355. The FDA was given no authority to require premarketing review of products falling outside the expanded "new drug" category or exempted by the "grandfather" provisions.

Where Congress has wanted to give the FDA decision-making authority, it has known how to do it. See, *e.g.*, Sections 401, 403(j), 502(n), 21 U.S.C. §§ 341, 343(j), 352(n). But the Act makes no provision for FDA adjudication of whether a drug being marketed without an approved NDA is a "new drug" for which the manufacturer should have sought premarketing clearance. It contains no authority for administrative proceedings by which the FDA can order the filing of an NDA or order a halt in the marketing of a product that lacks an approved NDA. The FDA is authorized to investigate such a suspected violation of the Act, just as it may investigate a possible violation of the adulteration or misbranding provisions applicable to "new" and "old" drugs alike. Section 702, 21 U.S.C. § 372. It may, in its prosecutorial role, reach a conclusion that a particular product is a "new drug" requiring premarketing approval. But, as the Fourth Circuit observed in *Bentex*,

> "that opinion is not adjudicatory, it is only the basis on which the FDA, as the prosecutor or initiator of either a seizure or injunctive action in the District Court, may invoke the jurisdiction of that

> Court to determine, among other issues, whether the drug challenged is a 'new drug'." 463 F.2d at 370 (J.A. 266).

In fact, enforcement suits under the "new drug" provision commonly present the courts with a disagreement between the FDA and the manufacturer over a product's status as a "new drug." "New drug" status is "an issue that must be and is resolved . . . in practically every injunctive, seizure, or criminal proceeding under the Act." *Bentex, supra*, 463 F.2d at 372 (J.A. 269) (citing cases).

This does not, as the Government asserts, make for an irrational or ineffective legislative scheme. To the contrary, a manufacturer who entertains some doubt about the "new drug" status of his product need not await FDA enforcement action to remove the uncertainty. The FDA's regulations have long provided that a manufacturer may request the FDA to give an informal opinion on the "new drug" status of a product. See 21 C.F.R. § 130.39. The courts have held—and the FDA has conceded—that the FDA's expression of opinion is a sufficiently final "agency action" to permit the manufacturer to sue for a declaratory judgment under *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). *E.g.*, *AMP, Inc.* v. *Gardner*, 389 F.2d 825, 826 & n.2 (2d Cir.), *cert. denied*, 393 U.S. 825 (1968). Thus, where the manufacturer and the FDA differ on the "new drug" status of a product, each has an orderly way under the Act to obtain an impartial judicial resolution of the issue. Until very recently, the FDA did not resist a manufacturer's declaratory judgment suit on the ground that the agency itself was empowered to adjudicate the issue subject only to limited judicial review. See, *e.g.*, *AMP, Inc.* v. *Gardner*, *supra*; *Durovic* v. *Richardson*, 327 F. Supp. 386 (N.D. Ill. 1971); *Tara Industries, Inc.* v. *Finch*, CCH Food, Drug & Cosm. L. Rptr. ¶ 40,816 (D.D.C. 1970); *Lemmon Pharmacal Co.* v. *Richardson*, 319 F. Supp. 375 (E.D. Pa. 1970); *cf. Merritt Corp.* v. *Folsom*,

165 F. Supp. 418 (D.D.C. 1958) ("new drug" status determined in suit to enjoin further Government seizure actions).

Nor does this scheme make it difficult to enforce effectively the "new drug" provisions of the Act. The manufacturer who markets a drug without an approved NDA does so at his own risk—the considerable risk of seizure, injunction, or even criminal punishment if a court rules in an enforcement suit that he was wrong in believing his product not to be a "new drug."

The Government suggests that the Fourth Circuit's ruling in *Bentex* will "transfer to the courts" an "enormous volume" of litigation (Brief for Petitioners in No. 72-555, at 34, 58), and that such litigation will involve complex technical questions difficult for the courts to decide. (*Id.* at 34, 39, 43, 44, 55-57.) Both suggestions are wrong. The *Bentex* decision does not create any *new* caseload for the courts, because the courts have always been responsible for deciding "new drug" status, either in an enforcement action [31] or in a declaratory judgment suit.[32]

---

[31] See, *e.g.*, *United States* v. *Article of Drug . . . Sudden Change*, 409 F.2d 734 (2d Cir. 1969); *United States* v. *Article of Drug . . . Furestrol*, 415 F.2d 390, 392 (5th Cir. 1969) (*per curiam*); *United States* v. *41 Cases . . . Myconox & Ferro-Lac*, 420 F.2d 1126, 1128 (5th Cir. 1970); *United States* v. *Seven Cartons . . . Ferro-Lac*, 424 F.2d 1364, 1365 (7th Cir. 1970); *United States* v. *354 Bulk Cartons . . . Trim Reducing-Aid Cigarettes*, 178 F. Supp. 847, 852-53 (D.N.J. 1959); *United States* v. *Article of Drug . . . Quinaglute*, 268 F. Supp. 245, 248-49 (E.D. Mo. 1967); *United States* v. *Articles of Drug . . . Quick-O-Ver*, 274 F. Supp. 443, 445-46 (D. Md. 1967); *United States* v. *Article of Drug . . . Line Away*, 284 F. Supp. 107, 112-13 (D. Del. 1968), *aff'd on other grounds*, 415 F.2d 369 (3d Cir. 1969); *United States* v. *Article of Drug . . . Magic Secret*, 331 F. Supp. 912, 914-17 (D. Md. 1971); *United States* v. *Article of Drug . . . Excedrin PM*, CCH Food Drug & Cosm. L. Rptr. ¶ 40,486 (E.D.N.Y., No. 70-C-77, Mar. 5, 1971). See also *United States* v. *Allan Drug Corp.*, 357 F.2d 713 (10th Cir.), *cert. denied*, 385 U.S. 899 (1966).

[32] See, *e.g.*, *AMP, Inc.* v. *Gardner*, *supra*; *Durovic* v. *Richardson*, *supra*; *Lemmon Pharmacal Co.* v. *Richardson*, *supra*; *cf. Merritt Corp.* v. *Folsom*, *supra*.

The Government has made no showing that the courts have been burdened with too many cases of either type. As the Fourth Circuit noted, there is nothing novel about judicial resolution of "new drug" status—what is novel is the Commissioner's assertion that he has the power, nowhere conferred by the Act, to adjudicate the need for a manufacturer to file an NDA for a particular product. 463 F.2d at 370-71 (J.A. 266-67).

Also incorrect is the suggestion that determining "new drug" status requires "resolution of technical issues of fact, requiring highly specialized knowledge, training and experience of a kind not ordinarily possessed by judges." (Brief for Petitioners in No. 72-555, at 43.) In making that argument, the Government blurs the distinction between the legal test of "new drug" status (whether a product is "generally recognized" by experts as safe and effective) and the test for approval of an NDA for a "new drug" (whether the drug is safe and effective *in fact*). Determining whether a drug is *actually* safe or effective may require the resolution of difficult scientific questions, and that determination is made by the FDA in the first instance when it passes on an NDA or when it later decides whether to withdraw its approval.[33] But where "new drug" status is the question, "the safety of the products is not what is at issue . . . . The question is whether there is general recognition among qualified experts of the products' safety and effectiveness." *AMP, Inc.* v. *Gardner, supra*, 389 F.2d at

[33] Even the issue of *actual* safety or effectiveness is decided by the courts where the FDA challenges statements of safety or effectiveness in a drug's labeling as a violation of the misbranding provisions of the Act. The courts have not shown any inability to decide that issue when required. See, *e.g.*, *United States* v. *Lanpar Co.*, 293 F. Supp. 147, 151-54 (N.D. Tex. 1968); *United States* v. *354 Bulk Cartons . . . Trim Reducing-Aid Cigarettes, supra*, 178 F. Supp. at 851-52.

831. The courts unanimously recognize this distinction.[34] To decide "new drug" status, a court need only determine the nature of a drug's reputation among persons with relevant expertise, not whether that reputation is scientifically accurate. The courts can readily decide that question on the basis of expert testimony about the drug's reputation. See *United States* v. *Articles of Drug . . . Quick-O-Ver*, *supra*. "General recognition" is, as the court in *Bentex* observed, "manifestly a justiciable issue." 463 F.2d at 372 (J.A. 269).

The Government goes so far as to argue that there is no difference whatever between the test of substantial evidence of effectiveness and the test of general recognition of effectiveness. (Brief for Petitioners in No. 72-555, at 55-57.) We believe that this issue need not be decided by the Court in these cases.[35] Moreover, there is no basis whatever for the Government's remarkable contention. The statutory definition of substantial evidence of effectiveness appears in Section 505(d) of the Act and is explicitly made applicable only to that subsection and

---

[34] See, *e.g.*, *United States* v. *Article of Drug . . . Bentex Ulcerine*, 469 F.2d 875, 878-79 (5th Cir. 1972); *United States* v. *Article of Drug . . . Furestrol*, *supra*, 415 F.2d at 392, *aff'g* 294 F. Supp. 1307, 1310-11 (N.D. Ga. 1968); *United States* v. *Article of Drug . . . Excedrin PM*, *supra*, CCH Food, Drug & Cosm. L. Rptr. ¶ 40,486, at 41,226; *United States* v. *Article of Drug . . . Line Away*, *supra*, 284 F. Supp. at 112; *United States* v. *Articles of Drug . . . Quick-O-Ver*, *supra*, 274 F. Supp. at 445-46.

[35] The Government apparently believes that the question is presented in No. 72-414, *Hynson, Westcott & Dunning, Inc.* v. *Weinberger*. (Memorandum for Respondents on Petition for Certiorari in No. 72-414, at 5-7; Brief for Petitioners in No. 72-555, at 57 n.83.) But the question is not addressed in the petitioner's brief, or in the lower courts' opinions, in that case. In any event, if the Court affirms the Fourth Circuit's decision in *Bentex*, holding that the FDA has no authority to determine the "new drug" issue, there would be no occasion to reach this question in the *Hynson, Westcott & Dunning* case.

to Section 505(e).[36] There is nothing in the legislative history of the 1962 Amendments to indicate that Congress intended the substantial evidence test to have a broader application, or that it intended in enacting the new test to obliterate entirely the distinction between "old" and "new" drugs. The Government's position would effectively deprive the careful definition of "new drugs" in Section 201(p) of the Act of any function, and would sweep all drugs under a requirement of proof of effectiveness by "adequate and well-controlled investigations."

The Commissioner, unhappy with the structure of the Act granting him jurisdiction only to approve, disapprove, or withdraw approval of NDAs filed with him, has now attempted to substitute a regulatory system under which manufacturers would have to submit *all* drugs to the FDA for administrative determination of their "new drug" status. His substitute system rests on two assertions: first, that as a matter of law every filing of an NDA raises for the FDA's determination the issue whether the NDA should have been filed at all; and second, that, where an NDA is not filed, Section 5(e) of the Administrative Procedure Act (which authorizes all agencies to issue declaratory orders where necessary "to determine a controversy or remove uncertainty")[37] requires resort to an administrative "declaratory judgment" proceeding before the FDA to determine whether a product is a "new drug." Thus, the "new drug" status of every drug would come before the FDA for adjudication in one way or another.

This jerrybuilt construct falls of its own weight. The filing of an NDA simply does not under the Act place at issue the "new drug" status of the product covered. To the contrary, it indicates that the manufacturer has

---

[36] Section 507(h) also applies the substantial evidence definition to certain antibiotics. 21 U.S.C. § 557(h).

[37] 5 U.S.C. § 554(e).

chosen not to seek resolution of the issue.[38] The FDA's regulations nowhere suggest that "new drug" status is an issue to be decided in NDA approval or withdrawal proceedings. And we are aware of no case in which the filing of an NDA has been regarded by either the FDA or a reviewing court as raising the "new drug" issue for decision.[39]

To read Section 5(e) of the APA as transferring the determination of "new drug" status from a judicial to an administrative forum is equally unsound. That section authorizes an agency to decide by declaratory order only questions which it is otherwise authorized to adjudicate on the record of a hearing. *Boston & M.R.R.* v. *United States*, 162 F. Supp. 289, 293-94 (D. Mass.), *appeal dismissed*, 358 U.S. 68 (1958).[40] In this respect, it mir-

---

[38] The Fourth Circuit in *Bentex* said that the filing of an NDA is a "concession" of the "new drug" status of a product. 463 F.2d at 371 (J.A. 268). Whatever the court meant by that, we would not agree that such a filing "concedes" anything about what the status of a drug may be years after the filing. Since a drug that is initially "new" may cease to be so by becoming generally recognized as safe and effective, the original filing of an NDA has no bearing on the status of the drug at a later date.

[39] The Government raises the spectre of abuse of the administrative process by a manufacturer who unsuccessfully challenges a withdrawal of NDA approval before the FDA and on review in the court of appeals, and then seeks "to litigate afresh in a district court the question whether the drug involved required an NDA in the first place." Brief for Petitioners in No. 72-555, at 35, 55. This is an illusory problem. If a manufacturer failed to bring a declaratory judgment suit until after the withdrawal of approval was upheld by the court of appeals, that failure might well justify a district court's refusal in its equitable discretion to entertain a request for declaratory judgment.

[40] The Attorney General's Manual on the APA makes this point perfectly clear:

> "This grant of authority to the agencies to issue declaratory orders is limited by the introductory clause of Section 5 so that such declaratory orders are authorized only with respect to matters which are required by statute to be determined 'on

rors the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, which authorizes the federal courts to issue declaratory judgments but confers no new jurisdiction on them.[41] In both of the cases cited by the Government in which Section 5(e) was invoked, it was conceded that the agency had authority to adjudicate the question it was attempting to decide by declaratory order. *Frozen Food Express* v. *United States*, 351 U.S. 40, 41, 44 (1956); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 372-73 n.3 (1969). As we have shown, the Food, Drug, and Cosmetic Act does not authorize the FDA to adjudicate "new drug" status. Therefore, Section 5(e) is of no help to the Government at all.

The Government's theory that Section 5(e) confers such jurisdiction, moreover, proves too much. It would logically apply not only to the determination of "new drug" status but also to any question under the Act now

---

the record after opportunity for an agency hearing.' . . . For example, where an agency is authorized after hearing to issue orders to cease and desist from specified illegal conduct, it may, under Section [5(e)], if it otherwise has jurisdiction, issue a declaratory order declaring whether or not specified facts constitute illegal conduct. On the other hand, while the Securities and Exchange Commission has long issued informal advisory interpretations through its principal officers as to whether a proposed issue of securities would be exempt from the registration requirements of the Securities Act, there is no statutory agency hearing procedure in which this question can be determined; if securities are sold without registration and the Commission believes that registration was required, it can only institute civil or criminal proceedings. Accordingly, Section [5(e)] does not authorize the Commission to issue declaratory orders as to whether particular securities must be registered under the Securities Act." Attorney General's Manual on the Administrative Procedure Act 59 (1947).

The situation of the FDA with respect to questions of "new drug" status is identical to that of the Securities and Exchange Commission in the Attorney General's example.

[41] *E.g.*, *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950); see Attorney General's Manual, *supra*, at 59-60.

decided by the courts. The theory would transform the Act from one enforced largely in the courts, with the Government as prosecutor, to one in which every "controversy" or "uncertainty" is decided in an administrative proceeding where the Commissioner is both prosecutor and judge, and where his decisions are conclusive except for limited judicial review. Whatever the merits of such a change as a matter of policy, it can be effected only by an act of Congress.

The patchwork nature of the Government's argument is further demonstrated by its attempt to find authority for judicial review of the declaratory orders on "new drug" status it claims the FDA has authority to make. The Act authorizes review of the Commissioner's disapproval or withdrawal of approval of an NDA in the courts of appeals, § 505(h), 21 U.S.C. § 355(h), but provides for no other appellate review of decisions under Section 505. See *Turkel* v. *FDA*, 334 F.2d 844, 845-46 (6th Cir. 1964), *cert. denied*, 379 U.S. 990 (1965). Thus, declaratory orders on "new drug" status would not be reviewable in the courts of appeals. The Commissioner suggests that this gap can be closed by permitting the *district courts* to review his declaratory orders under the general review provision in the APA. The result would be that the Commissioner's rulings on "new drug" status would be reviewable sometimes in the courts of appeals (when approval of an NDA has been refused or withdrawn) and sometimes in the district courts. There is nothing to indicate that Congress contemplated such an incongruous result.

The Government relies on a number of decisions of this Court to establish the broad proposition that an agency always has implicit authority to adjudicate the question of its own jurisdiction. (See Brief for Petitioners

in No. 72-555, at 57-60.) However, those cases are clearly not in point. In *Ricci* v. *Chicago Mercantile Exchange*, 93 S.Ct. 573 (1973), this Court dealt with a statute containing an express grant of authority to the Commodity Exchange Commission to "adjudicate and remedy" any violation of the statute or regulations under it. Acting on the "premise" that the question before the Court fell within the agency's adjudicatory power, the Court ruled that the agency should be permitted to decide it first. *Id.* at 581-82. The Court was careful to distinguish its earlier decision in *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), where the Court had refused to require judicial deference to an agency which "had no authority to deal with" the question presented. *Id.* at 579-80. Thus, *Ricci* and *Silver* together stand only for the proposition that where an agency has authority to decide a question, the courts will often defer to it to decide the question in the first instance.

Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), and *Marine Engineers Beneficial Ass'n* v. *Interlake S. S. Co.*, 370 U.S. 173 (1962), both involved applications of the National Labor Relations Act, which conferred "exclusive" jurisdiction on the National Labor Relations Board to adjudicate "any unfair labor practice affecting commerce." Act of July 5, 1935, § 10(a), 49 Stat. 453, *as amended*, 29 U.S.C. § 160(a). In *Myers* the Court held that, since the Board was authorized to decide whether commerce is affected in a particular case, subject to judicial review, an employer could not take that question to court before the Board proceedings were completed. In *Interlake*, the Court held that the Board's exclusive jurisdiction to determine what is a "labor organization" within the Act precluded the state courts from entertaining a suit to determine that question at the same time the Board proceedings were going on.

Similarly, in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), the FPC had unquestioned authority to determine whether a natural gas system was interstate and therefore subject to federal control, and the agency was conducting proceedings to decide that question. This Court simply held that the federal courts should not determine the question for themselves "when the precise issue . . . is in the process of litigation through procedures originating in the [agency]." *Id.* at 647. In each of these cases, the statute itself gave the agency the authority to decide the question involved. They have no application in this context, where the Act does not.[42]

The Government purports not to argue that the existing jurisdiction of the courts to determine "new drug" status should be cut off, but only that the FDA should be given *concurrent* jurisdiction to decide the issue. In *Bentex* the Government argued in the district court that the Commissioner should be given "primary jurisdiction" and that the declaratory judgment suit should, therefore, be dismissed. The district court rejected that argument, ruling that it has jurisdiction "concurrent" with the FDA; however, it then proceeded to defer to the FDA for an initial determination of "new drug" status. The Government, having failed to appeal the rejection of its primary jurisdiction theory, now acquiesces in the district court's ruling. (Brief for Petitioners in No. 72-555,

---

[42] *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946), is even farther afield. In that case, the Federal Wage and Hour Administrator was seeking to exercise his authority to investigate possible violations of the Fair Labor Standards Act, 29 U.S.C. §§ 209, 211. Certain corporations being investigated tried to defeat judicial enforcement of subpoenas on the ground that the Act did not apply to them. The Court held that the Administrator was free to *investigate* the question of coverage, in the performance of his job of "searching out violations with a view to securing enforcement of the Act." 327 U.S. at 216. The power of the FDA in its prosecutorial role to investigate the coverage of the "new drug" provisions is not disputed in the cases now before the Court.

at 46 n.76.) But it is clear that there is no functional difference between the primary jurisdiction theory and the district court's notion of concurrent jurisdiction. As the district court's action in *Bentex* demonstrates, deference to the agency under a concurrent jurisdiction rule would be virtually automatic. The result would be to transfer the determination of "new drug" status in all instances from the courts to the FDA. Both the primary and concurrent jurisdiction theories share a common defect: Both ignore the basic fact that "[t]he only adjudicatory right vested by the Act in the Secretary relates to approval, or withdrawal of approval, of a 'new drug' application." *Bentex*, 463 F.2d at 371 (J.A. 267).

The Commissioner may have reason to wish he had the jurisdiction he asserts. As both prosecutor and judge, he could sweep drugs into the "new drug" category subject only to limited appellate review in the courts. Under the Act as Congress wrote it, on the other hand, the Commissioner has the burden of proving in court in an enforcement action that a product falls within the "new drug" provision.[43] The Commissioner is attempting to shift this burden by assigning himself the right of decision and then requiring the manufacturer to convince a reviewing court that the decision is not supported by substantial evidence in the record. Moreover, the Government appears to argue that the Commissioner's decision would be conclusive in a later enforcement proceeding. (Brief for Petitioners in No. 72-555, at 45 n.74.) Not only would that stand the Act on its head, but by shifting

[43] *E.g.*, *Bentex*, 463 F.2d at 371-72 (J.A. 268-69); *United States* v. *Article of Drug . . . Bentex Ulcerine*, *supra*, 469 F.2d at 878-79; *United States* v. *Articles of Drug . . . Quick-O-Ver*, *supra*, 274 F. Supp. at 445-46. FDA officials have recognized that the burden of proof in an enforcement action is on the Government. See *United States* v. *Allan Drug Corp.*, *supra*, 357 F.2d at 718 (quoting statement by HEW Secretary); CHRISTOPHER, CASES & MATERIALS ON FOOD & DRUG LAW 461 (1966) (quoting statement by FDA Deputy Commissioner).

the burden of proof in a criminal enforcement action, it would raise obvious constitutional issues. See *In re Winship*, 397 U.S. 358 (1970).

In sum, as the Fourth Circuit in *Bentex* concluded, the Act gives the Commissioner no authority to adjudicate the "new drug" status of a manufacturer's product. Where the Commissioner believes a manufacturer has wrongly failed to file an NDA, the Act gives him "certain potent judicial remedies, *available exclusively in the District Court.*" [44] The decision of the Fourth Circuit to that effect should be affirmed.

III. The Fourth Circuit Improperly Denied "Grandfather" Protection Under Section 107(c)(4) of the 1962 Drug Amendments to Products Which Were Neither "New" nor Covered by an Effective New Drug Application on the Day Before the Enactment Date of the Amendments.

USV Pharmaceutical Corp. v. *Weinberger*, No. 72-666, and *Hynson, Westcott & Dunning, Inc.* v. *Weinberger*, No. 72-414, raise questions concerning the scope of protection, under the "grandfather" clauses of the 1962 Drug Amendments, P.L. 87-781, 76 Stat. 780, 788-89, afforded to drugs which were no longer "new" drugs on the day before the enactment date of the Amendments but which had previously been covered by effective new drug applications.

Under Section 505(a) of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 355(a), it is unlawful to market a "new drug" unless there is an effective NDA for such drug on file with the FDA. Before the enactment date of the 1962 Drug Amendments, a "new drug" was defined in Section 201(p) of the Act as one

> "not generally recognized, among experts qualified by scientific training and experience to evaluate the

[44] 463 F.2d at 366 (J.A. 260) (emphasis in original).

> safety of drugs, as safe for use under the conditions prescribed, recommended, or suggested in the labeling thereof . . . ." 52 Stat. 1041 (1938).

The FDA was required under Section 505 to deny or suspend the effectiveness of an application if it appeared that the drug was unsafe or the application incomplete or inaccurate. 52 Stat. 1052-53 (1938).

The Amendments added a requirement of *effectiveness* to the existing requirement of *safety*. This change was reflected in two basic ways. First, the category of "new drugs" subject to the application requirements was expanded to include any drug the safety *and* effectiveness of which is not generally recognized by qualified experts. Section 201(p), 21 U.S.C. § 321(p). Second, Section 505 was amended to require the FDA to deny or withdraw approval of an NDA if it appears that there is not "substantial evidence" that the drug will have the effect claimed for it. Sections 505(d) and (e), 21 U.S.C. §§ 355 (d) and (e).

The Amendments included two grandfather provisions providing exemptions for drugs already on the market. Section 107(c)(3) provides that any drug for which there was an effective NDA on the day before the enactment date[45] may continue to be marketed, even without substantial evidence of effectiveness, so long as approval of the NDA is not withdrawn. And approval of the NDA could not be withdrawn, pursuant to Section 505(e), on the ground of lack of substantial evidence of effectiveness, until two years after the enactment date.

In addition, Section 107(c)(4), which is at issue here, provides a permanent exemption for certain other drugs, so long as there is no change in their recommended uses:

---

[45] Section 107(c)(2) provides that an application which was "effective" on the day before the enactment date shall be deemed "approved" by the FDA. And Section 107(c)(3) applies to all drugs whose applications are thereby deemed approved.

> "In the case of any drug which, on the day immediately preceding the enactment date, (A) was commercially used or sold in the United States, (B) was not a new drug as defined by section 201(p) of the basic Act as then in force, and (C) was not covered by an effective application under section 505 of that Act, the amendments to section 201(p) made by this Act shall not apply to such drug when intended solely for use under conditions prescribed, recommended, or suggested in labeling with respect to such drug on that day."

The Fourth Circuit [46] construed Section 107(c)(4) not to exempt drugs which had at any time prior to the day before the enactment date been covered by an effective NDA the approval of which had not been withdrawn pursuant to Section 505(e), 52 Stat. 1053 (1938). It also held that the so-called "me-too" drugs [47] were not covered by the NDAs of other manufacturers' "pioneers" and, thus, that they were entitled to exemption under the statute if they had become old, even though the pioneers were not exempt.[48]

The Government also takes the position that the exemption provided by Section 107(c)(4) does not apply to any drug for which there was *at any time* an effective NDA on file with the FDA, even if the drug had become gen-

---

[46] The court articulated its views in the *USV* case, 461 F.2d 223, 226-27 (J.A. 468-70), and it relied without elaboration upon that opinion for its holding on the grandfather issue in the *Hynson, Westcott & Dunning* case. 461 F.2d 215, 219 (J.A. 176).

[47] A "me-too" drug is one which is substantially identical in composition and claims to an NDA'd, "pioneer" drug. 461 F.2d at 228 n.15 (J.A. 470). Such drugs typically were marketed without NDAs because the NDA'd products had become generally recognized as safe.

[48] However, the court held that me-too drugs produced by the manufacturer of the NDA'd drug were covered by the NDA and, thus, were not grandfathered under Section 107(c)(4). 461 F.2d at 229-30 (J.A. 473).

erally recognized as safe before the 1962 Amendments and therefore did not need an NDA, unless the FDA had formally suspended the effectiveness of the NDA.[49] As will be demonstrated below, this position flies in the face of the legislative history of the 1962 Drug Amendments, would make Section 107(c)(4) meaningless, and depends upon a wooden reading of the literal language of that section in isolation, without regard even to the rest of Section 107(c) itself.

Properly construed, Section 107(c)(4) exempts from the amendments to Section 201(p) those drugs which had been commercially marketed prior to the day before the enactment date and had by then become generally recognized as safe for their indicated uses. Such drugs were not "new drugs" on the day before the enactment date, and thus were not then subject to the statutory requirement of an NDA as a condition of lawful marketing. Their NDAs had clearly become obsolete and superfluous.[50] Accordingly, such drugs could not be said to have

---

[49] See Memorandum for Respondents in No. 72-666, at 8. The Government parts company with the Fourth Circuit in maintaining that the me-too drugs were covered by the pioneers' NDA's. *Id.* at 9-11.

[50] This was recognized as recently as last year in testimony by the General Counsel of the FDA, who stated that NDA's are "obsolete or inactive" when "the drug has become an old drug." *Hearings on Present Status of Competition in the Pharmaceutical Industry Before the Subcommittee on Monopoly of the Senate Select Committee on Small Business*, 92d Cong., 2d Sess., Part 22, at 8530. Similarly, a commentator has noted:

> "It just doesn't seem to make any sense to argue that such [old] drugs remained 'covered by' their earlier NDA clearance when the manufacturing procedure, formulation, claims, and so forth, could have been (and often were) changed without the necessity of submitting a supplemental NDA unless the change was such that it caused the drug to become again a new drug, and when any newcomer could market the same drug without any NDA clearance." Hagan, *Grandfather Protection Under the Drug Admendments of 1962*, 19 FOOD DRUG COSMETIC L.J. 119, 123 (1964).

been covered by an effective application and, thus, are grandfathered, as to pre-1962 claims, by Section 107(c)(4).[51] These products, of course, are still fully subject to the adulteration and misbranding sections of the statute, so the FDA is assured of ample power to protect the public health.[52]

A. *The Grandfather Clause Must Be Construed in Light of Congress' Basic Intention to Apply the Effectiveness Requirement Only to New Products and New Claims for Old Drugs.*

The legislative history of the 1962 Amendments bearing directly upon Section 107(c)(4) is admittedly sparse. But an examination of the legislative history of the basic effectiveness amendments to which this grandfather provision relates sheds considerable light on its meaning. That history makes it clear that Congress did not intend to subject existing claims for "old" drugs to the new effectiveness requirements.

The amendment to Section 201(p) of the basic Act expanding the definition of "new drug" to include any drug not generally recognized as effective, as well as safe, was included in the original version of the 1962 Drug Amendments, S. 1552. However, when the bill was

---

[51] This construction of Section 107(c)(4) obviates resolution of the question of whether the so-called me-too drugs should be deemed to be "covered" by NDAs issued to pioneer products. Because of a divergence of interest among its member companies, PMA expresses no view on the question of whether—if the construction of Section 107(c)(4) urged here is rejected—me-too products can nonetheless qualify for grandfather protection, as USV maintains in No. 72-666.

[52] For example, manufacturers who make extravagant claims for the effectiveness of their products have rendered the products misbranded under Section 502(a) of the Act, 21 U.S.C. § 352(a), and have, therefore, committed a prohibited act subjecting themselves to the full range of enforcement actions under Title III of the Act.

first reported out of the Senate Judiciary Committee on July 19, 1962, this provision was eliminated, and the existing definition of "new drug" was left unchanged. The Committee feared that changing the definition would have the effect of causing old, "established drugs," which were generally recognized as safe and, thus, not "new drugs," to be deemed "new drugs" required to go through the new drug clearance procedure. S. REP. NO. 1744, 87th Cong., 2d Sess. 17 (1962).

Several members of the Committee, including the bill's sponsor, Senator Kefauver, dissented from this decision and argued that the definition of a "new drug" should be amended to include a requirement of effectiveness. Such a change was necessary, they reasoned, in order that each *new claim* for drugs lawfully marketed would be subject to the effectiveness requirement. See *id.* at 34 (separate statement of Sens. Kefauver, Carroll, Dodd, Hart and Long). In other words, the dissenters did not take issue with the Committee's objective of exempting old drugs from the effectiveness requirement, except in the case of new claims. See also remarks of Senator Kefauver, 108 CONG. REC. 10278 (1962).[53]

Ultimately, Senator Kefauver prevailed, and the definition of "new drug" was changed in amendments to the bill which were reported out of the Judiciary Committee on August 21, 1962. The Committee Report which accompanied the amendments described the change as intended to eliminate ambiguity concerning "the circumstances and extent to which a new claim or change of claim" could be made without supporting evidence of effectiveness submitted to the FDA. S. REP. NO. 1744, 87th Cong., 2d Sess.

[53] The focus upon new claims for existing drugs was reflected later in the legislative history as well. See, *e.g.*, remarks of Senator Kefauver, 108 CONG. REC. 22045 (1962) (arguing that the definition of "new drugs" should me amended to close the "loophole" which would permit the manufacturer of an existing drug to avoid the new drug application procedure for new claims).

pt. 2, at 5 (1962). And Senator Eastland, chairman of the Judiciary Committee, introduced the new amendments with a lengthy discussion of the bill's provisions on the floor of the Senate:

> "The term 'new drug' is presently defined as one not generally recognized to be safe for the claimed uses or one, which while so recognized, has not been used for a material time or to a material extent for such uses. The bill would expand this definition so that the term 'new drug' would also include [a drug] not generally recognized to be effective for the claimed uses or one, which while so recognized, has not been used for a material time or to a material extent for such uses. Thus, *every brandnew product, and every new claim for an existing product*, would be subject to the tests and procedures established in section 505 of the act." 108 CONG. REC. 17366 (1962) (emphasis added).

The amendments reported out of the Judiciary Committee also included, for the first time, the grandfather provisions of Section 107(c). Section 107(c)(3) provided a limited, two-year grace period for drugs covered by effective NDAs, and Section 107(c)(4) provided a permanent exemption to certain other drugs. Evidently, this latter provision was included in the bill in order that the change in the "new drug" definition might serve its proponents' purposes without at the same time ignoring the repeated concern of Congress that established old drugs should not be required to go through the new drug procedure and demonstrate "substantial evidence" of effectiveness for existing claims. Senator Kefauver had anticipated the inclusion of this grandfather provision two weeks earlier. In arguing for the new definition of "new drugs," he was careful to note: "[T]he amendment to the definition of 'new drugs' would not require resubmission of all the thousands of 'new drugs' hitherto cleared for

the market in order to obtain reclearance for efficacy." 108 CONG. REC. 15696 (1962).[54]

In sum, the new definition of "new drugs" was intended only to assure that new products and new claims for existing old drugs would require substantial evidence of effectiveness. Neither the proponents nor the opponents of this change sought to require old drugs to demonstrate efficacy for existing claims as a prerequisite to continued marketing. Section 107(c)(4), which provides an exemption from the change in the definition of "new drugs," must be construed in furtherance of this purpose. The construction of Section 107(c)(4) urged by the Government, which would have the result of causing the thousands of drugs already lawfully on the market and generally recognized as safe to be subject to the amended new drug clearance procedure, flies in the face of this clear and overriding legislative purpose.

---

[54] In light of this repeated concern in the legislative history that not all drugs previously on the market should be required to demonstrate effectiveness for existing claims, the language in the Conference Report, H.R. REP. No. 2526, 87th Cong., 2d Sess. 23 (1962), that Section 107(c)(4) applies to drugs that have "never previously been subject to the new-drug procedure" should properly be construed as a partial description of the class of drugs grandfathered by the provision, and not as a limitation upon the scope of the provision. Nothing in the quoted language or the history of the section suggests that Congress intended it to be such a limitation. Moreover, if construed as a limitation, the language proves too much, for it would be inconsistent with the concession by both the Fourth Circuit (461 F.2d at 219, 227 (J.A. 176, 469)) and the Government (Memorandum for Respondents on Petition for Certiorari in No. 72-666, at 8) that, under some circumstances, an effective NDA could have ceased to be effective before 1962. See 52 Stat. 1053 (1938). What is more, as will be seen below, such a construction, when combined with the Government's position that me-too drugs are covered by NDAs for pioneer products, would render Section 107(c)(4) entirely meaningless.

B. *The Construction Urged by the Government Would Render Section 107(c)(4) Meaningless.*

The reading of Section 107(c)(4) urged by the Government not only is fundamentally inconsistent with the legislative history, but also would result in a strained and senseless construction of the statute. Indeed, in the last analysis, the Government's construction would as a practical matter render Section 107(c)(4) entirely meaningless.

All drugs which were sold prior to 1938 are exempted from the new drug application procedure by Section 201(p) of the Act, 21 U.S.C. § 321(p). Since a drug could not become an old drug without having been marketed for a time (Section 201(p)(2)), every drug first marketed between 1938 and 1962 must have at some time been a "new drug." See 52 Stat. 1041 (1938). And no such drug could lawfully have been marketed without an effective NDA. 52 Stat. 1052 (1938). If, as the Government maintains, an NDA which is once effective is always effective and if the so-called me-too drugs are deemed to be "covered" by the NDA for the pioneer drug, then every drug which was at any time "new" would have been covered by an effective application on the day before the enactment date.[55] Thus, other than those drugs already exempted by Section 201(p), no drug would qualify for exemption under Section 107(c)(4),

---

[55] In spite of the fact that both the Fourth Circuit in *USV* (461 F.2d at 226 (J.A. 468)) and the Government (see Memorandum for Respondents in No. 72-666, at 7-8) purport to recognize that a "new drug" may have become old when, as a result of widespread experience and use, it became generally recognized as safe, their claim now—that a drug remained covered by an effective NDA no matter how obsolete or superfluous the NDA may have become—amounts to saying that every drug which was *once* "new" before the enactment date of the Amendments, and thus subject to the NDA requirements, was *always* "new."

and that provision would serve no purpose at all.[56] This Court should not construe Section 107(c)(4) in such a way as to render it entirely meaningless, when a sensible alternative construction is available. See, *e.g.*, *Rosado* v. *Wyman*, 397 U.S. 397, 415 (1970).

In order to avoid having to defend a construction of the statute which would render Section 107(c)(4) entirely meaningless, the Government argues that a drug may have ceased to be covered by an effective NDA if the effectiveness of the NDA had been formally suspended by the FDA pursuant to Section 505(e). See Memorandum for Respondents on Petition for Certiorari in No. 72-666, at 8. The Fourth Circuit took the same position in the *USV* decision. 461 F.2d at 227 (J.A. 469). But Section 505(e) simply required the FDA to suspend the effectiveness of an NDA when it found that the drug was unsafe. On its face, it is clear that section was intended, not to restrict the circumstances under which an NDA may become ineffective, but only to limit the circumstances under which a manufacturer could have required continued FDA approval. In construing the statute as precluding termination of the effectiveness of an NDA under any other circumstances, the Government would have this Court believe that Congress intended suspension of effectiveness of an NDA for lack of safety to be a prereq-

[56] Surely, Congress did not intend to exempt only those drugs which were never covered by effective NDAs and yet were marketed unlawfully, and we assume the Government does not suggest that Section 107(c)(4) grandfathers such drugs.

The Fourth Circuit's view of Section 107(c)(4) would preserve a limited purpose for it—to grandfather me-too products that were generally recognized as safe on the day before the enactment date of the Amendments. However, nothing in the legislative history of the statute suggests that this grandfather provision was intended to apply *only* to those drugs. This Court can avoid this distinction between pioneers and me-toos, without reaching the me-too question or prejudicing the status of me-too drugs under the grandfather clause, by holding that the Section 107(c)(4) exemption applies to all old drugs, pioneers and me-toos as well.

uisite to exemption under the grandfather clause. Surely Congress could not have intended such an absurd result.

Thus, the position of the Government would compel an irrational construction of Section 107(c)(4): it would render that grandfather provision substantially useless.

C. *The Fourth Circuit Erred in Relying upon the "Surplusage" Argument.*

In its *USV* decision, the Fourth Circuit rejected, for one reason only, the argument advanced here that an old drug could not be "covered by an effective" application and that Section 107(c)(4) therefore served to exempt existing claims for old drugs from the amended "new drug" definition. "The difficulty with this argument, plausible though it may be," reasoned the court, "is that it would make surplusage of requirement (C) in the exemption statute." 461 F.2d at 227 (J.A. 469). In other words, the Fourth Circuit maintained that if every drug which satisfied clause (B) of Section 107(c)(4) (*i.e.*, every old drug) thereby met the requirements of clause (C) (*i.e.*, ceased to be covered by an effective NDA), then clause (C) would be redundant, mere surplusage. The view that the construction of Section 107(c)(4) adopted by the Fourth Circuit was necessary in order to prevent clause (C)'s being unnecessary was the *only* basis for the court's holding.

Although this reasoning has some superficial appeal when Section 107(c)(4) is read in isolation, its plausibility as a basis for decision vanishes when that provision is read in conjunction with the remainder of Section 107 and, in particular, Section 107(c)(3). For when those two provisions are read together, it is apparent that clause (C) is unnecessary surplusage under the Fourth Circuit's and the Government's construction of Section 107

(c) (4)—based upon the premise that a no longer "new" drug may still be covered by an effective NDA—as well as the construction urged here. Under the circumstances, this Court should disregard the surplusage issue and adopt that construction which gives the most sensible meaning to Section 107(c) (4) as a whole.

Section 107(c) (3) provides, in effect, that a drug whose application is deemed approved, *i.e.*, one whose application was effective on the day before the enactment date of the Amendments, may have its application withdrawn after two years on account of inefficacy. Without clause (C), Section 107(c) (4) provides that drugs which were "old" on the day before the enactment date are forever exempted from the requirement of showing efficacy as to existing claims. Obviously, Section 107(c) (4), *even without clause (C)*, could apply only to old drugs not covered by an effective NDA, because Section 107(c) (3) makes it clear that all drugs covered by an effective NDA are not permanently grandfathered. If Section 107(c) (4), even without clause (C), were read to permanently grandfather old drugs covered by effective NDAs, then Sections 107(c) (3) and (4), read together, would stand for the inconsistent propositions that a drug which is old but which is covered by an effective NDA (1) may have its new drug application withdrawn on grounds of inefficacy after two years (§ 107(c) (3)), and (2) is exempt from the efficacy requirements of the Act (§ 107(c) (4)). In order to avoid this patent contradiction, Section 107(c) (4), even without clause (C), would have to be read to apply only to drugs not covered by effective applications. Thus, the purpose assigned to clause (C) by the Government and the Fourth Circuit—distinguishing old drugs covered by effective applications from those not so covered—is actually served by Section 107(c) (3). In short, even under the Fourth

Circuit's and the Government's view, clause (C) is superfluous.[57]

The error in the court's analysis stems from its asking what purpose clause (C) serves, given clauses (A) and (B). The more logical way to interpret Section 107(c)(4) is to begin at the end of Section 107(c)(3). Section 107(c)(3) defines the grandfather protection for drugs covered by effective applications. What is left are drugs not covered. Thus, analytically, clause (C) serves as a restatement in Section 107(c)(4) of the relevant aspect of Section 107(c)(3). The question the Fourth Circuit should have asked is, given 107(c)(3) and 107(c)(4)(C), why include 107(c)(4)(A) and (B). The reason, obviously, is to prevent exempting from the efficacy requirements drugs which were not covered by an effective application but had not become generally recognized as safe through commercial use.

In sum, the surplusage argument upon which the Fourth Circuit relied provides no basis for distinguishing the construction urged here from that argued by the Government. Since Section 107(c)(3) governs all drugs that are covered by effective NDAs, there is no construction of Section 107(c)(4) under which clause (C) is not surplusage. This Court should therefore construe Section 107(c)(4) in light of its legislative purpose and the statutory

[57] The Government might attempt to avoid this dilemma by arguing that Section 107(c)(3) applies, not to all drugs with effective applications, but only to "new drugs" with effective applications. Given this reading of Section 107(c)(3), the class of drugs which meet the requirements of Section 107(c)(4)(B) might include old drugs covered and those not covered, apparently making (C) necessary. The trouble with this argument, however, is that, since Section 107(c)(3) does not refer to "new" or old drugs, the narrowing gloss on 107(c)(3)—that it applies only to "new drugs"—would depend upon the premise that a drug with an effective application *must* be "new", *i.e.*, that an old drug cannot be covered by an effective NDA. Thus, such an argument would depend upon the very premise the Government rejects.

scheme as a whole. Congress did not intend its 1962 Amendments to apply to existing claims for old drugs, nor did it write Section 107(c)(4) with no purpose in mind. That provision should be construed to exempt from the new "new drug" definition all drugs which had become generally recognized as safe by the day before the enactment date of the Amendments, because such drugs cannot in any meaningful sense be said to have been "covered by an effective" NDA at that point.[58] Accordingly, the decision of the Fourth Circuit denying grandfather status to such drugs should be reversed.

---

[58] Such a holding would make unnecessary the Court's deciding separately the status under the grandfather provisions of drugs whose NDAs had been withdrawn by action of the manufacturer. See Brief for Petitioner in No. 72-666, at 68-76.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals in the *Hynson, Westcott & Dunning* case (Nos. 72-397 and 72-414) should be affirmed insofar as the court held that the FDA could not withdraw approval of the manufacturer's NDA without providing a hearing on the question of substantial evidence of effectiveness; the judgment of the court of appeals in No. 72-528 should be reversed; the judgment of the court of appeals in No. 72-555 should be affirmed; and the judgment of the court of appeals in No. 72-666 should be reversed.

Respectfully submitted,

LLOYD N. CUTLER
DANIEL MARCUS
A. DOUGLAS MELAMED
WILLIAM T. LAKE
WILMER, CUTLER & PICKERING
900 - 17th Street, N.W.
Washington, D. C. 20006

Attorneys for Pharmaceutical Manufacturers Association, Amicus Curiae

Of Counsel:

BRUCE J. BRENNAN
RODNEY R. MUNSEY
Pharmaceutical Manufacturers Association
1155 - 15th Street, N.W.
Washington, D. C. 20005

April 2, 1973

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-634

CASPAR W. WEINBERGER, ET AL., *Petitioners*

v.

HYNSON, WESTCOTT AND DUNNING, INCORPORATED, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

No. 72-414

HYNSON, WESTCOTT AND DUNNING, INCORPORATED, *Petitioner*

v.

CASPAR W. WEINBERGER, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

No. 72-595

CIBA CORPORATION, *Petitioner*

v.

CASPAR W. WEINBERGER, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

No. 72-596

CASPAR W. WEINBERGER, ET AL., *Petitioners*

v.

BENTEX PHARMACEUTICALS, INC., ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

No. 72-636

USV PHARMACEUTICAL CORPORATION, *Petitioner*

v.

CASPAR W. WEINBERGER, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF THE PROPRIETARY ASSOCIATION

THOMAS D. FINNEY, JR.
JOHN F. KOVIN
THOMAS RICHARD SPRADLIN
815 Connecticut Avenue
Washington, D. C. 20006

DANIEL F. O'KEEFE, JR.
1700 Pennsylvania Avenue
Washington, D. C. 20006

Of Counsel:

CLIFFORD, WARNKE, GLASS,
McILWAIN & FINNEY
Washington, D. C.

April 3, 1973

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

APPENDIX: Page

CITATIONS

CASES: Page

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-394

CASPAR W. WEINBERGER, ET AL., *Petitioners*

v.

HYNSON, WESTCOTT AND DUNNING, INCORPORATED, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

No. 72-414

HYNSON, WESTCOTT AND DUNNING, INCORPORATED, *Petitioner*

v.

CASPAR W. WEINBERGER, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

No. 72-528

CIBA CORPORATION, *Petitioner*

v.

CASPAR W. WEINBERGER, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

No. 72-555

CASPAR W. WEINBERGER, ET AL., *Petitioners*

v.

BENTEX PHARMACEUTICALS, INC., ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

No. 72-666

USV PHARMACEUTICAL CORPORATION, *Petitioner*

v.

CASPAR W. WEINBERGER, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE PROPRIETARY ASSOCIATION

The Proprietary Association, pursuant to Rule 42 of the Rules of this Court, hereby respectfully moves this Court for leave to file a brief *amicus curiae* in these cases, treating the issues raised therein and opposing the position of the Government petitioners in *Weinberger* v. *Bentex Pharmaceuticals, Inc., et al.*, No. 72-555 (hereafter *"Bentex"*). Written consent for the filing of such brief has been obtained from the Solicitor General and from the attorneys for all parties involved except Hynson, Westcott and Dunning, Incorporated, whose attorneys have withheld consent.

Movant, The Proprietary Association, is a 92-year-old national trade association located at 1700 Pennsylvania Avenue, N.W., Washington, D. C. 20006, whose 82 active member companies manufacture and distribute most of the Nation's supply of proprietary "over-the-counter" medicinal preparations ("OTC drugs"). OTC drugs are those which can be legally dispensed without a prescription; "proprietary" OTC drugs are those which are promoted and sold directly to the public; and "pharmaceutical" or "ethical" OTC drugs are those which are sold without prescription but promoted only to members of the health professions.

These cases present the question, as stated in the Government's brief in *Bentex:* "Whether the Food and Drug Administration has jurisdiction to determine initially whether a product is a 'new drug' which must be administratively approved as safe and effective before it can be sold in commerce." Brief for Petitioners, *Weinberger* v. *Bentex Pharmaceuticals, Inc., et al.*, No. 72-555, p. 2. Others of the cases here consolidated involve related questions.

The Court's decision on these issues will so substantially and directly affect Movant's members in the con-

duct of their business of manufacturing and distributing OTC drugs as to justify the Court's granting leave to file a brief *amicus curiae.*

Moreover, in its brief in *Bentex,* the Government refers to the Food and Drug Administration's current regulatory program for the review of OTC drugs. It describes this program adopted in May 1972 (37 Fed. Reg. 9464) as follows:

> "... a procedure for determining in substantive rule making, by therapeutic class, whether particular OTC products not covered by NDAs are generally recognized as safe and effective and not misbranded, under the standards of the Act. The procedure involves the establishment of independent expert panels for different categories of OTC drugs (e.g., antacids, laxatives, analgesics), which would review all available data (including any that manufacturers, consumer groups, or others wish to submit) and prepare monographs prescribing drug composition, labeling, and manufacturing controls. Products conforming to the monograph-rule will not be considered to be 'new drugs' requiring an NDA or to be misbranded." *Id.* at pp. 24-25.

By formal comments filed with the Commissioner of Food and Drugs on March 4, 1972, The Proprietary Association objected to the above-described program as later adopted in May 1972. It was and continues to be the position of The Proprietary Association that the FDA does not have statutory authority to issue substantive regulations, having the force of law, as contemplated in the OTC review program. During the time since the adoption of the program The Proprietary Association has co-operated fully in the scientific review, but has carefully preserved its right to con-

test in an appropriate judicial proceeding the legality of the FDA's issuance of a final monograph as a binding regulation.

The Government now apparently seeks, through its brief in No. 72-555, to obtain a premature review by this Court of the validity of its OTC regulations. Its brief includes the following comments:

> "Moreover, the implications of the decision below extend beyond the area of prescription drugs involved in the present case. The agency's current program to review the over-the-counter drugs (see pp. 24-25, *supra*) would also be undermined by the court of appeals' rationale, since the agency would have no power to determine definitively, subject to judicial review, standards by which hundreds of thousands of drugs for which no NDA is in effect may be classified as 'new drugs' or not. The agency would be required to pursue these products throughout the courts of the Nation in innumerable trials considering *de novo* issues that are best suited to administrative resolution and that may, indeed, already have been given careful consideration in administrative proceedings. The decision of the court of appeals would thus leave the agency virtually impotent to deal effectively with the vast task of implementing the 1962 amendments." *Id.* at pp. 36-37.

The Government's effort to bring before the Court its current regulatory effort regarding OTC drugs provides a controlling reason for the Court to grant The Proprietary Association leave to file an *amicus* brief. The Government raises matters which go far beyond the individual interests of the parties now before the Court in these cases. Those parties will necessarily concentrate on the particular facts and issues in their individual cases. We believe that a brief *amicus*

curiae on behalf of The Proprietary Association can assist the Court in resolving the issues now before it and contribute to a more thorough understanding of the profound impact which these decisions will have on both the prescription and the proprietary industries.

THOMAS D. FINNEY, JR.
JOHN F. KOVIN
THOMAS RICHARD SPRADLIN
815 Connecticut Avenue
Washington, D.C. 20006

DANIEL F. O'KEEFE, JR.
1700 Pennsylvania Avenue
Washington, D.C. 20006

Of Counsel:

CLIFFORD, WARNKE, GLASS,
McILWAIN & FINNEY
Washington, D.C.

April 3, 1973

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-394

CASPAR W. WEINBERGER, ET AL., *Petitioners*

v.

HYNSON, WESTCOTT AND DUNNING, INCORPORATED, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

No. 72-414

HYNSON, WESTCOTT AND DUNNING, INCORPORATED, *Petitioner*

v.

CASPAR W. WEINBERGER, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

No. 72-528

CIBA CORPORATION, *Petitioner*

v.

CASPAR W. WEINBERGER, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

No. 72-555

CASPAR W. WEINBERGER, ET AL., *Petitioners*

v.

BENTEX PHARMACEUTICALS, INC., ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

No. 72-666

USV PHARMACEUTICAL CORPORATION, *Petitioner*

v.

CASPAR W. WEINBERGER, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF AMICUS CURIAE ON BEHALF OF THE PROPRIETARY ASSOCIATION

OPINIONS BELOW

In No. 72-394, *Weinberger* v. *Hynson, Westcott and Dunning, Incorporated,* and No. 72-414, *Hynson, Westcott and Dunning, Incorporated* v. *Weinberger* (hereafter *"Hynson"*), the opinion of the Court of Appeals, captioned *Hynson, Westcott and Dunning, Inc.* v. *Richardson,* is reported at 461 F.2d 215 (4th Cir. 1972). Joint App. 258-270. The opinion of the District Court is not officially reported. Joint App. 251-258.

In No. 72-528, *CIBA Corporation* v. *Weinberger* (hereafter *"CIBA"*), the opinion of the Court of Appeals, captioned *CIBA Corporation* v. *Richardson,* is reported at 463 F.2d 225 (3d Cir. 1972). Joint App. 215-216. The opinion of the District Court was delivered orally and not reported. Joint App. 208-214.

In No. 72-555, *Weinberger* v. *Bentex Pharmaceuticals, Inc., et al.* (hereafter "Bentex"), the opinion of the Court of Appeals, captioned *Bentex Pharmaceuticals, Inc., et al.* v. *Richardson,* is reported at 463 F.2d 363 (4th Cir. 1972). Joint App. 258-270. The opinion of the District Court is not officially reported. Joint App. 251-258.

In No. 72-666, *USV Pharmaceutical Corporation* v. *Weinberger* (hereafter "USV"), the opinion of the Court of Appeals, captioned *USV Pharmaceutical Corporation* v. *Richardson,* is reported at 461 F.2d 223 (4th Cir. 1972). Joint App. 466-473. The opinion of the District Court is not officially reported, but is reprinted at CCH Food Drug Cos. L. Rep. ¶ 40-489. Joint App. 463-466.

QUESTIONS PRESENTED

Four basic questions are presented by these consolidated cases, one of which involves subsidiary questions which it may be helpful to state explicitly:

(1) Does the Food and Drug Administration ("the FDA") have statutory authority to make a legally binding determination as to whether a drug which has never been the subject of a New Drug Application ("NDA") is a "new drug," as that term is defined in the Federal Food, Drug, and Cosmetic Act? (*Bentex*)

(2) Does Section 107(c)(4) of the Drug Amendments of 1962 give the FDA indirect authority to make a binding administrative determination of the right of a manufacturer to continue to market a drug which has never been the subject of a New Drug Application, by withdrawing its approval of a New Drug Application covering a different but similar drug? (*Bentex* and *USV*)

(3) Does Section 107(c) of the Drug Amendments of 1962 exempt a drug from administrative proceedings to withdraw approval of the NDA covering such drug? (*Hynson*)

(4) If a drug which was once a "new drug" and was originally marketed pursuant to an NDA becomes "generally recognized as safe and effective," does it cease to be a "new drug" as defined in the Act? (*Hynson* and *CIBA*) If so, two subsidiary questions are presented:

(A) Does general recognition of a drug's safety and effectiveness terminate the FDA's au-

thority to withdraw its prior approval of the NDA covering that drug? (*Hynson*)

(B) After the FDA has issued a final order withdrawing its prior approval of an NDA, can the manufacturer continue to market the drug, if it is "generally recognized as safe and effective"? (*CIBA*)

STATEMENT

I. The Relevant Statutory Provisions

A. The "New Drug" Provisions

The Federal Food, Drug, and Cosmetic Act of 1938 ("the Act") replaced the Food and Drugs Act of 1906. A major change made by the 1938 Act was to require pre-marketing clearance by the FDA.[1] However, such pre-clearance was made applicable only to a "new drug," and the FDA's authority was originally limited to a determination of safety. Prior to its amendment in 1962 the Act prohibited the introduction into interstate commerce of any new drug unless an application was "effective with respect to such drug." It provided that such application would "become effective" on the 60th day after it was filed unless the FDA issued a notice postponing the effective date for up to 180 days or issued "an order refusing to permit the appli-

[1] The authority and responsibility under the 1906 and 1938 Acts were originally vested in the Secretary of Agriculture. The functions of the Secretary of Agriculture under the Act were assigned to the Food and Drug Administration, which was transferred in 1940 to the Federal Security Agency, and in 1953 to the Department of Health, Education, and Welfare. While the Act speaks in terms of "the Secretary," the Secretary of the latter department has delegated his authority under the Act to the Commissioner of Food and Drugs. 21 C.F.R. § 2.120; 21 U.S.C. § 321 note (1970). We use "the Commissioner" and "the FDA" as synonymous terms.

cation to become effective." § 505 of the Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1052; Joint App. 483-484.

The Act was amended in 1962 to require the FDA to determine that a "new drug" is effective as well as safe, and to require an NDA to be affirmatively approved rather than "becoming effective" unless refused.[2] The Act prohibits the introduction into interstate commerce of any "new drug" unless the FDA has approved an NDA filed pursuant to the Act. §§ 301(d) and 505, 21 U.S.C. §§ 331(d) and 355. A violation of this provision carries criminal penalties of imprisonment for not more than one year or a fine of not more than $1,000, or both. § 303(a), 21 U.S.C. § 333(a). Such violations may be restrained in an action brought in any U.S. District Court, and a drug introduced into interstate commerce in violation of Section 505 may be seized and condemned in an action filed in the U.S. District Court for the district where such drug is found. §§ 302(a) and 304(a), 21 U.S.C. §§ 332(a) and 334(a).

Section 201(p) defines the term "new drug" to mean: "Any drug . . . the composition of which is such that such drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety *and effectiveness* of drugs, as safe *and effective* for use under the conditions prescribed, recommended, or suggested in the labeling thereof . . . ," and "which has not . . . been used to a material extent or for a material time . . . ." 21 U.S.C.

---

[2] Section 107(c)(2) of the 1962 Amendments provides that a New Drug Application which was "effective" under the 1938 Act on the enactment date of the amendments shall be deemed to be an application "approved" under the Act as amended. Public Law 87-781, 76 Stat. 788-789, 21 U.S.C. § 321 note (1970); Joint App. 481-482.

§ 321(p). The words in italics were added by the 1962 Amendments. In essence, as relevant to the issues presented in these cases, if a drug is "generally recognized . . . as safe and effective," it is not a "new drug" and the provisions of the statute requiring FDA clearance of "new drugs" do not apply.

However, certain drugs even if *not* generally recognized as both safe and effective are still not "new drugs," because of the "grandfather" provisions contained in the original Act and in the 1962 Amendments. Section 201(p)(1) provides further that "a drug not so recognized [as safe and effective] shall not be deemed to be a 'new drug' if at any time prior to the enactment of this Act [on June 25, 1938] it was subject to the Food and Drugs Act of June 30, 1906, as amended, and if at such time [*i.e.,* before June 25, 1938] its labeling contained the same representations concerning the conditions of its use. . . ." Furthermore, a drug which is not generally recognized as effective is not a "new drug" if on the day immediately preceding the date of enactment of the 1962 Amendments, October 9, 1962, it (A) was commercially used or sold in the United States, (B) was not a new drug as defined by the Act as then in force, *i.e.,* was generally recognized as safe, and (C) was not covered by an effective New Drug Application—"when intended solely for use under conditions prescribed, recommended, or suggested in labeling with respect to such drug" on October 9, 1962. The 1962 Amendments provided that the amended definition of a "new drug," requiring that a drug be generally recognized as effective to avoid "new drug" status, should not apply to a drug meeting the foregoing requirements. § 107(e)(4) of P.L. 87-781, 76 Stat. 788, 21 U.S.C. § 321 note; Joint App. 482.

Thus, three categories of drugs are not "new drugs" and therefore may be marketed without prior clearance and approval by the FDA:

(1) a pre-1938 drug, the labeling of which still contains the same representations concerning its use; and

(2) a pre-1962 drug which was generally recognized as safe and not covered by an effective NDA in 1962, the labeling of which still contains the same representations concerning its use;

(3) a drug which is generally recognized as safe and effective after it has been used to a material extent or for a material length of time.

It should be noted that in each case whether a drug fits one of these three excluded categories involves questions of fact with respect to the particular drug.[3]

B. The "Misbranding" Provisions

The Act likewise prohibits the introduction or delivery for introduction into interstate commerce of any drug that is "misbranded." § 301(a), 21 U.S.C. § 331 (a). A violation of this provision also carries criminal penalties of imprisonment for not more than one year or a fine of $1,000, or both. § 303(a), 21 U.S.C. § 333(a). Such violation may be restrained in an action brought in any U.S. District Court, and a misbranded drug which is introduced into interstate com-

[3] Under a separate paragraph of the "grandfather" clause in the 1962 Amendments, "new drugs" for which an NDA was "effective" on the enactment date of the amendments were granted a two-year moratorium from withdrawal of approval of the NDA under § 505(e) for lack of effectiveness. § 107(c)(3) of P.L. 87-781, 76 Stat. 788, 21 U.S.C. § 321 note; Joint App. 481.

merce or held for sale after interstate shipment may be seized and condemned in an action filed in the U.S. District Court for any district where such drug is found. §§ 302(a) and 304(a), 21 U.S.C. §§ 332(a) and 334(a).

Section 502 provides that a drug shall be deemed to be "misbranded" (1) if its labeling is false or misleading (§ 502(a)), (2) if its labeling does not bear adequate directions for use and adequate warnings as are necessary for the protection of the user (§ 502(f)), or (3) if it is dangerous to health when used in the dosage, with the frequency, or for the duration recommended in the labeling (§ 502(j))—as well as under a number of other circumstances not relevant here. 21 U.S.C. § 352. It should again be noted that whether a drug is misbranded depends upon factual questions with respect to the truth and adequacy of the labeling of the particular drug.

The statutory sanctions against misbranded drugs are applicable by their terms to any "drug," and make no distinction as to whether the drug involved is a pre-1938 drug, a pre-1962 drug which is generally recognized as safe, a drug which is generally recognized as safe and effective, or a "new drug." However, as discussed *infra,* pp. 60-61, there are alternative administrative sanctions available to deal with false and misleading labeling of an NDA'ed drug.

C. Enforcement of the Statutory Provisions

The Act clearly contemplates and authorizes administrative enforcement of its provisions with respect to a "new drug" upon the filing of a New Drug Application. Section 505(b), 21 U.S.C. § 355(b), provides that an application to market a "new drug" shall be filed

with the Secretary (by delegation, the Commissioner of Food and Drugs), and specifies the nature of the data which must be submitted. Section 505(d), 21 U.S.C. § 355(d), enumerates the grounds upon which the Secretary shall disapprove such application, while Section 505(c), 21 U.S.C. § 355(c), commands that if none of such grounds exist he shall approve the application. Section 505(d), 21 U.S.C. § 355(d), requires that the applicant be given an opportunity for a hearing and *authorizes the Secretary to determine* whether the data submitted includes adequate tests to establish the drug's safety, whether the results of such tests show that the drug is safe, whether the proposed methods of manufacture are adequate, whether the drug will have the effect it purports or is represented to have, and whether the labeling proposed is false or misleading in any particular. Similarly, Section 505(e), 21 U.S.C. § 355(e), authorizes the Secretary to make such determinations after notice and opportunity for hearing if he proposes to withdraw approval of an application previously granted. Section 505(h), 21 U.S.C. § 355(h), authorizes the applicant to appeal to a United States Court of Appeals from orders of the Secretary refusing or withdrawing approval of an application, and provides that the finding of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive.

Thus, "the agency does have direct authority to enforce [a] regulation in the context of passing upon applications for clearance of new drugs, § 505, 21 U.S.C. § 355 . . . ." *Abbott Laboratories, et al.* v. *Gardner,* 387 U.S. 136, 152 (1967). However, no provision of the Act gives the FDA comparable direct regulatory authority to make a binding determination as to whether a drug is "generally recognized as safe and effective."

II. The Five Cases Before The Court

There is a basic factual distinction which must be kept in mind in considering the five cases before the Court. The drugs involved in *Bentex* and two of the drugs involved in *USV* have never been the subject of an NDA. In contrast, the drugs involved in *Hynson* and *CIBA* and the remaining drugs involved in *USV* had all been the subject of effective NDA's prior to marketing.

A. The Bentex Case

The drugs involved in *Bentex* were marketed by their manufacturers prior to 1962 without filing an NDA, on the grounds that at the time of their introduction they were generally recognized as safe. After receipt in 1970 of an advisory letter from the FDA that their drugs were "new drugs" which were not marketable because no NDA had been filed, the manufacturers brought a declaratory judgment action in the District Court. The District Court referred to the FDA for administrative determination, after notice and hearing, the question whether the drugs involved were "new drugs." This case therefore poses directly the question whether the Food and Drug Administration has statutory authority to make a legally binding administrative determination as to whether drugs which had never been the subject of an NDA were "new drugs" as defined in the Act.[4] The Court of Appeals reversed and remanded the case to the District

[4] The same question is not directly before the Court with respect to the non-NDA'ed drugs involved in *USV*. There the District Court in a declaratory judgment action determined after trial that the non-NDA'ed drugs were not "new drugs" because exempted under the provisions of the "grandfather" clause in the 1962 Amendments. § 107(c)(4) of P.L. 87-781. The Government has abandoned its challenge to the District Court's exercise of jurisdiction to hear and decide this case on the merits.

Court for determination of this question, holding, we believe properly, that the FDA does not have authority to decide in an administrative proceeding whether a drug for which no NDA has been filed is a "new drug."

The Government's brief as petitioner in *Bentex* discusses a subsidiary issue as to whether withdrawal of approval of an NDA covering one drug represents a binding administrative determination of a different manufacturer's right to continue to market a similar drug which has never been the subject of an NDA. However, the Court of Appeals did not treat this issue in its opinion in *Bentex,* observing in a footnote that the Government's argument had been described by a commentator as "lacking in merit," and in any event involved disputed issues of fact which "may be inquired into on remand." 463 F.2d at 368, fn. 18; Joint App. 264. The issue is treated more extensively in the same court's opinion in *USV,* discussed *infra,* pp. 14-15.

B. The CIBA Case

The drug involved in *CIBA* had been the subject of an NDA which became effective before 1962 based upon proof of safety. In 1969, as the result of a report received from a panel of the National Academy of Sciences-National Research Council, the FDA indicated its intention to withdraw approval of the NDA. Following promulgation of revised regulations governing such withdrawal proceedings, the FDA in 1970 issued a formal notice of its intention to withdraw approval. The manufacturer requested a hearing, and advised the FDA that it contended that its drug was not a "new drug" and that its request for a hearing was "made with a reservation of the right to establish these facts in the administrative proceedings, or in

judicial proceedings, or both." The FDA denied the request for a hearing and issued an order withdrawing approval of the NDA. On appeal the Court of Appeals affirmed the order.

Prior to the FDA's final order withdrawing approval of the NDA, the manufacturer filed an action for a declaratory judgment to determine whether its drug was a "new drug." After issuance of the FDA's final order but before the appeal was heard, the District Court dismissed the action on the ground that even if it had jurisdiction it would exercise its discretion and refuse to determine the question presented. On appeal the Court of Appeals affirmed this dismissal on the grounds that the FDA has primary jurisdiction to adjudicate whether a drug is a "new drug" and had necessarily decided that question in the administrative proceeding withdrawing approval of the NDA; and that the question was subject to review on direct appeal. The case thus presents a related but different question from that posed in *Bentex:* Whether the FDA's statutory authority to withdraw its prior approval of an NDA depends upon a prior determination that the subject drug is still a "new drug" as defined in the Act. We submit that the FDA does not have authority to adjudicate whether a drug is a "new drug," that this question is not presented in a proceeding to withdraw the FDA's prior approval of a New Drug Application, that the action of the District Court was an abuse of its discretion, and that the holding of the Court of Appeals was erroneous.

C. The Hynson Cases

In *Hynson* the procedural history is somewhat different, but the cross-petition in No. 72-414 presents the same basic question as does the petition in *CIBA.*

Again, the drug involved was marketed before 1962 after an NDA became effective on the basis of proof of safety. Again, based on the report of an NAS-NRC review panel, and after giving the manufacturer an opportunity to submit additional data, the FDA published a formal notice of its intention to withdraw approval of the NDA. The manufacturer requested a hearing, reserving the right to contest the jurisdiction of the FDA in the administrative proceedings, or in judicial proceedings, or in both, based on the contention that the drugs were no longer "new drugs" as defined in the Act.

Before any action had been taken on this request, the manufacturer filed an action for a declaratory judgment, asking for a determination as to whether its drug was a "new drug," and alleging as one of its grounds that "the contemplated administrative hearing will not offer an opportunity to plaintiff to contest the jurisdiction of defendants on the ground that [the drugs] are not 'new drugs'." Joint App. 17. The District Court dismissed the suit on the ground that these issues were within the primary jurisdiction of the FDA and that the manufacturer had failed to exhaust its administrative remedies. The court directed "an agency determination on the record made before the agency" of the issues as to whether the drugs were generally recognized as safe and effective or exempted from the effectiveness provisions of the Act by the 1962 "grandfather" clause. Joint App. 23.

No appeal was taken from this order of dismissal. Instead the manufacturer requested a hearing by the FDA on these questions. The FDA denied the request for a hearing and issued an order withdrawing approval of the NDA. On direct appeal from the

Commissioner's order, the Court of Appeals reversed the FDA's order because of its refusal to grant a hearing.

However, that court held that a hearing was required on the issue of whether the agency's approval of the NDA should be withdrawn, not as to whether the drug involved was still a "new drug." The Government, as petitioner in No. 72-394, asserts error in requiring a hearing on the issue of withdrawal; and the manufacturer, as the cross-petitioner in No. 72-414, apparently asserts error in the failure to require a hearing on two additional issues: (1) whether the drug is exempted from administrative withdrawal of approval of its NDA by Section 107(c) of the 1962 Amendments; and (2) whether the drug is still a "new drug." We express no opinion as to whether the manufacturer was entitled to a hearing on the issue of withdrawal, but submit that the court properly limited its remand to that issue, because no drug is exempted from a proceeding to withdraw approval of its NDA by Section 107(c), and the question of new-drug status is not presented in an administrative proceeding to withdraw approval of an NDA.

D. The USV Case

As indicated above, the *USV* case involves both drugs which were the subjects of pre-1962 NDA's, which "became effective" based on proof of their safety, and similar drugs which the same manufacturer marketed without filing an NDA based on the general recognition of their safety. The case does not present the issue as to the FDA's authority to adjudicate new-drug status, because the Government does not challenge here the jurisdiction of the District Court in a declara-

tory judgment action to decide that question. The District Court held both the NDA'ed and non-NDA'ed drugs to be exempt from the "effectiveness" provisions of the Act by the 1962 "grandfather" clause. The Court of Appeals reversed, holding *first,* that Section 107(c)(4) of the 1962 Amendments does not apply to a drug marketed after an NDA is approved (or becomes effective); and *second,* we think incorrectly, that if an NDA covering one drug is effective, another similar drug marketed *by the same manufacturer* without an NDA was nevertheless "covered by an effective application"—i.e., that of the "pioneer" drug—and thus not exempt under Section 107(c)(4) of the 1962 Amendments.

The Government now confesses that this distinction, based on whether the "me-too" drug was marketed by the same or a different manufacturer, is erroneous, but argues that the court was correct in reversing. The Government contends that withdrawal of an approved NDA covering one drug represents a binding administrative determination of the right of *any* manufacturer to market a similar drug which has never been the subject of an NDA. We disagree.

ARGUMENT

I. Introduction and Summary

The Government's lead brief in these consolidated cases is its Brief for Petitioner in No. 72-555, *Weinberger* v. *Bentex Pharmaceuticals, Inc., et al.* In it the Government seeks nothing less from this Court than a sweeping grant of authority to make a binding legal determination in administrative proceedings of its own contriving as to whether every drug now on the market can continue to be marketed and for what

purposes. It asks this Court totally to ignore the provisions of the governing statute and the administrative interpretation and judicial construction of that statute extending over a period of thirty-five years. It asks the Court to grant it authority to adjudicate factual issues which Congress has committed to the courts, and to issue regulations having the force of law as to matters in which no legislative authority has been delegated.

On the other hand, some of the drug manufacturers involved in these cases seek to have the Court impose limitations on the the authority of the Food and Drug Administration beyond those imposed by the literal terms of the statute or intended to be imposed by the Congress.

Both the Government and some of the manufacturers urge upon the Court strained constructions of the transitional provisions, the "grandfather" clause, contained in the Drug Amendments of 1962. A number of the questions presented in these cases are resolved by giving effect to the literal terms of and Congressional intent with respect to these provisions.

The provisions of the Act which must govern these cases, while sometimes convoluted, are essentially clear. In the basic Act passed in 1938 Congress sought to insure that before new drugs were introduced an expert scientific agency should be satisfied as to their safety. Congress considered that a "new drug" was one which had not been on the market for a substantial length of time so as to become generally recognized as safe. They exempted from pre-marketing clearance by the agency drugs already on the market, but provided that all drugs, old or new, could be removed from

the market by seizure and condemnation, or their distribution enjoined, if they were adulterated or unsafe for use as directed or if their labeling were false and misleading.

The amendments enacted in 1962 did not change this basic approach. New drugs henceforth would be required to show by acceptable scientific evidence that they were both safe and effective before they could be marketed. Manufacturers of drugs already cleared for safety by the agency under an NDA were not required to submit new applications demonstrating their effectiveness, except for new claims made after 1962, unless the agency withdrew its prior approval for lack of effectiveness, and this the agency was not authorized to do for two years from the date of enactment. Drugs already on the market without an approved NDA, on the basis that they were generally recognized as safe, were permanently exempted from becoming "new drugs" by reason of the changed definition which in the future would require general recognition of both safety and effectiveness to avoid the new drug procedures, but only on the condition that no new claims are made for the drug.

The Act does not contemplate or authorize the FDA to make a binding determination in an administrative proceeding as to whether a drug for which no New Drug Application has been filed is a "new drug," or is adulterated, or is misbranded. The agency may investigate suspected violations (§ 702, 21 U.S.C. § 372), but it is the District Courts of the United States which have jurisdiction to restrain violations (§ 302, 21 U.S.C. § 332), and it is in the District Courts of the United States that a drug in violation of the Act may be "proceeded against . . . and condemned" (§ 304, 21 U.S.C. § 334).

Factual determinations which the agency is not authorized to make in an adjudicatory proceeding with respect to a particular drug it is likewise not authorized to make in a rule-making proceeding which purports to apply to all drugs or to all drugs of a particular type. Similarly, what the FDA cannot adjudicate directly it likewise cannot adjudicate indirectly. The Act neither contemplates nor authorizes that an order of the agency withdrawing approval of a New Drug Application should have binding legal effect upon the right to market other drugs never the subjects of New Drug Applications, because of their similarity to the drug subject to the order.

On the other hand, the FDA is not only authorized but also mandated by the statute to withdraw its approval of a New Drug Application whenever, on the basis of later information, it makes the requisite statutory findings as to the drug's lack of safety or effectiveness. The two-year moratorium on the FDA's authority to withdraw approval of an NDA for lack of effectiveness, provided by Section 107(c)(3) of the 1962 Amendments, has expired; and in none of the cases before the Court did the agency attempt such withdrawal before that moratorium ended. The "grandfather" provision contained in Section 107(c)(4) of the 1962 Amendments does not exempt *any* drug from an administrative proceeding to withdraw approval of its New Drug Application, because Section 107(c)(4) does not apply to a drug which has been the subject of a New Drug Application.

Several of the parties involved in these cases contend that a drug which was once a "new drug," and was originally marketed pursuant to a New Drug Application, may subsequently become "generally recognized

as safe and effective" and thus cease to be a "new drug." They explicitly urge, or assume, that the right to market such drug no longer depends upon an approved New Drug Application. This construction has been adopted by officials of the agency in the past and appears to be accepted by the Government.

However, even if one accepts the premise that the manufacturer of a drug marketed pursuant to an approved New Drug Application can continue to market that drug after approval is withdrawn, if the drug has become generally recognized as safe and effective, it does not follow that such general recognition terminates the right of the agency to withdraw its prior approval of the NDA.

To retain approval of its NDA, a drug must meet the specific standards of the statute, and a strong case can be made that the medical and scientific community is entitled to know whether it meets such standards. Not only is there nothing in the statute to suggest that the agency's right to withdraw its approval is terminated if a drug becomes generally recognized as safe and effective, but also the statute on its face mandates such withdrawal if the statutory standards for continued approval are not met. The fact that the Congress enacted a specific provision suspending such right of withdrawal on grounds of effectiveness suggests that had it intended to impose further limitations on the agency's withdrawal of approval it would have done so.

Since the agency's right and duty to withdraw approval under certain circumstances are not affected by a drug's achieving general recognition, whether the drug has achieved such recognition is not an issue in the administrative proceeding to withdraw approval of the NDA. Moreover, to hold otherwise would mark the

virtual end of the agency's summary judgment procedure, because it would require as a practical matter that a hearing be held in almost every administrative proceeding to withdraw approval. Since the determination as to whether a drug is generally recognized as safe and effective involves adjudicative facts, a hearing would be required by due process whenever a genuine issue was raised as to such recognition.

In the cases before the Court, the lower courts have not dealt with the question of whether a drug, the NDA for which has been withdrawn, can remain on the market on the basis of general recognition of its safety and effectiveness. However, upon remand of *CIBA*, this issue would be directly posed in the declaratory judgment action to determine the plaintiff's right to continue to market the drug on such basis.

If this Court should affirm the foregoing view as to the system of administrative and judicial enforcement established by the Act, none of the dire predictions made by the Government would come to pass. It is highly unlikely that the widespread litigation which the Government fears will ever occur, particularly if the Court rejects the strained constructions of the "grandfather" provisions which are urged upon it.

In such litigation as does occur, the District Courts are perfectly well able to determine whether a drug is "generally recognized as safe" or "generally recognized as safe and effective," as they have been doing effectively since passage of the Act in 1938. This is a simple inquiry into the nature of expert opinion about the drug, and requires no technical or scientific expertise of the kind involved in the agency's approval of a New Drug Application.

What the Government in fact desires, the determination by the agency of all factual questions with respect to all drugs without hearings, would require sweeping changes in the Constitution as well as in the basic statute.

II. The Food and Drug Administration Has No Authority To Make a Legally Binding Administrative Determination as to Whether a Drug Which Has Never Been the Subject of a New Drug Application Is a "New Drug"

A. The FDA Has No Authority To Adjudicate This Issue

Unless an NDA has been filed, the FDA's statutory role is prosecutorial, not adjudicatory. The Commissioner has no authority under the Act, either through adjudication or rule-making, to make a conclusive factual finding as to whether a drug which has never been the subject of a New Drug Application is a "new drug." This is a question for the courts.

The Act clearly contemplates and authorizes administrative enforcement of its provisions with respect to a New Drug Application. The Commissioner's authority with respect to an NDA is comprehensive and unequivocal. The House Committee's report on the 1938 Act shows that Congress clearly intended to grant such authority. It speaks of "*authoritative* review of the manufacturer's tests" and of "decisions of the administrative agency" which are subject to court review.[5] However, he has no such authority to deal administratively with drugs which have been marketed without the manufacturer's filing of a New Drug Application—whether it claims exemption from his regulatory regime because of their general acceptance as

[5] H.R. Rep. No. 2139, 75th Cong., 3d Sess. 9 (1938).

safe and effective drugs or because they are within the exemptive "grandfather" provision. Thus, if a drug subject to an NDA is "misbranded," the Commissioner has authority to proceed against it administratively by withdrawing approval. However, if a drug which he has not approved is misbranded, his sole means of enforcing the Act's prohibitions against the drug is by bringing a civil or criminal action authorized by the statute.

As the Court of Appeals recognized in its opinion in *Bentex,* the FDA's role with respect to a non-NDA'ed drug is that of prosecutor, not judge or lawmaker:

> "The FDA has neither primary jurisdiction, as the defendants argue, nor concurrent jurisdiction, as the District Court concluded, to adjudicate whether a product is an old or a new drug. It may, in its prosecutorial role, reach a conclusion that a product being marketed is a 'new drug' requiring pre-marketing approval; but that opinion is not adjudicatory, it is only the basis on which the FDA, as the prosecutor or initiator of either a seizure or injunctive action in the District Court, may invoke the jurisdiction of that Court to determine, among other issues, whether the drug challenged is a 'new drug'. There is manifestly no provision in the Act for an administrative proceeding before the Secretary to compel the filing of a 'new drug' application or to halt the marketing of a drug for which there is no approval by the Secretary. It is not without significance that, so far as the official reports reflect, the Secretary has never attempted directly to exercise such jurisdiction. * * * The only adjudicatory right vested by the Act in the Secretary relates to approval, or withdrawal of an approval, of a 'new drug' application." *Bentex Pharmaceuticals, Inc., et al.* v. *Richardson,* 463 F.2d 363, 370, 371 (4th Cir. 1972); Joint App. 266, 267.

In fact, the FDA's role as a prosecutor was recognized by this Court in its opinion in *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950). There the Court considered whether a decision to institute such a civil action could be enjoined. Section 304(a) of the Act (21 U.S.C. § 334(a)) authorizes *multiple* seizures of misbranded articles "when the Secretary has probable cause to believe from facts found, without hearing, ... that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer." Such multiple seizures were ordered through libel actions, and the manufacturer of the drug involved brought an action seeking to challenge directly the finding of probable cause. In its opinion in *Abbott Laboratories, et al.* v. *Gardner*, 387 U.S. 136 (1967), the Court described its prior holding as follows:

> "This Court held that the owner could raise his constitutional, statutory, and factual claims in the libel actions themselves, and that the mere finding of probable cause by the Administrator could not be challenged in a separate action. That decision was quite clearly correct. . . . The Court in *Ewing* first noted that the 'administrative finding of probable cause required by § 304(a) is merely the statutory prerequisite to the bringing of the lawsuit,' at which the issues are aired. 339 U.S., at 598. * * * Second, the determination of probable cause in *Ewing* has 'no effect in and of itself,' 339 U.S., at 598; only some action consequent upon such a finding could give it legal life." 387 U.S. at 147.

Similarly, if the FDA determines that a New Drug Application should have been filed covering a marketed drug, because it believes that the drug is not generally

recognized as safe and effective, or the FDA determines that a drug's labeling is false and misleading, this "has 'no effect in and of itself' . . . ; only some action consequent upon such a finding could give it legal life"—*i.e.*, "the bringing of a law suit."

This has been the unchallenged view of the statute since its enactment in 1938. Whether a particular drug was generally recognized as safe and effective has been regarded as a question of fact to be determined by the court in an action to seize the drug or enjoin its distribution. *United States* v. *One Device*, * * *, 160 F.2d 194 (10th Cir. 1947); *AMP Incorporated* v. *Gardner*, 389 F.2d 825 (2d Cir. 1968); *United States* v. *Articles of Drug* * * * *"Quick-O-Ver,"* 274 F.Supp. 443 (D. Md. 1967); *United States* v. *7 Cartons* * * *"Ferro-Lac* * * *," 293 F.Supp. 660 (S.D.Ill. 1968). Similarly, whether the labeling of a drug was false or misleading has been held to be a question of fact to be determined by the court in a civil or criminal action. *United States* v. *Kordel*, 164 F.2d 913 (7th Cir. 1948), *aff'd*, 335 U.S. 345 (1948); *Woodward Laboratories, Inc.* v. *United States*, 198 F.2d 995 (9th Cir. 1952); *United States* v. *Schlicksup Drug Co.*, 206 F.Supp. 801 (S.D.Ill. 1962); see also *Van Liew* v. *United States*, 321 F.2d 664 (5th Cir. 1963).

When the *Bentex* case was before the District Court, the Government, in total defiance of the Act and all judicial precedent, contended that the FDA has "primary and exclusive jurisdiction" to determine whether a drug is a "new drug," even when, as in *Bentex*, the drug had never been the subject of a New Drug Application. The District Court rejected this argument, and the Government did not assert its "primary and ex-

clusive jurisdiction" on appeal. While acknowledging that, because of its failure to appeal, this issue "is not presented in this Court," the Government nevertheless warns: "The agency believes, however, that it has primary jurisdiction over 'new drug' status, safety and effectiveness, and it will continue to assert this position where appropriate." Brief for Petitioners, *Weinberger* v. *Bentex Pharmaceuticals, Inc., et al.*, No. 72-555, pp. 46-47, fn. 76.

It appears that the Solicitor General does not agree with the claim of "the agency" that it has "primary and exclusive jurisdiction." The Government states in another footnote: "Of course, we do not deny that in enforcement proceedings the district court must decide whether a product is a 'new drug' subject to regulation, at least where the issue has not been litigated before the agency. See, *e.g., Bentex Ulcerine, supra.*[6] But the existence of such power in the courts is not inconsistent with its existence in the agency." *Id.* at p. 57, fn. 82. Even this concedes too little to the District Courts, in two respects. *First,* the expression of the FDA's opinion that the Act is being violated permits the manufacturer to bring an action for a declaratory judgment. *AMP, Inc.* v. *Gardner,* 389 F.2d 825, 826, and n. 2 (2d Cir. 1968), *cert. denied,* 393 U.S. 825 (1969). *Second,* the FDA has no authority to make a legally binding determination, the issue has never "been litigated before the agency," and the court is not ousted of jurisdiction by prior expression of opinion by the FDA.

The District Court, while holding that it had jurisdiction to determine new-drug status in an action for

---

[6] *United States* v. *An Article of Drug, "Bentex Ulcerine,"* 469 F.2d 875 (5th Cir. 1972).

a declaratory judgment and thus rejecting the argument that the FDA had "primary and exclusive jurisdiction," concluded that the FDA had "concurrent jurisdiction" and promptly referred the issue to the agency for determination. The Court of Appeals properly held that, "The FDA has neither primary jurisdiction, as the defendants argue, nor concurrent jurisdiction, as the District Court concluded, to adjudicate whether a product is an old or a new drug." *Supra*, p. 22.

The District Court reasoned that the statutory "grant of authority to approve or withhold approval of [a] new drug application, or to proceed with regulatory action in the courts, necessarily implies authority for F.D.A. to determine the threshold question of whether the article involved is a drug which requires an approved new drug application for lawful interstate shipment." Joint App. 255. Similarly, the Government argues that reference to the administrative agency is appropriate "where the question of an agency's threshold jurisdiction turns on the resolution of technical questions of fact of a kind arguably within the competence of the agency"; and that, "in conferring on the agency comprehensive powers to perform its mission, [the Congress] necessarily included the threshold power to decide whether products are 'new drugs' over which it has jurisdiction." *Id.* at pp. 59, 60.

What all of this conveniently overlooks is the factual situation in the case which was before the court. The FDA's claim of authority, never explicitly granted and never before asserted, to determine the "threshold question" of its jurisdiction, could arise only where that jurisdiction has been invoked by the filing of an NDA, since "[t]he only adjudicatory right vested by

the Act in the Secretary relates to approval, or withdrawal of an approval, of a 'new drug' application." *Bentex Pharmaceuticals, Inc.* v. *Richardson,* 463 F.2d 363, 371 (4th Cir. 1972); Joint App. 267. No NDA had been filed covering the drugs involved in *Bentex,* no manufacturer had asked the FDA to decide anything, and it was the agency which asserted *sua sponte* that the continued marketing of the drugs without NDA approval was a violation of the Act. As is discussed *infra,* pp. 65-73, even in a proceeding to withdraw approval of an NDA there is no "threshold question" of the agency's "jurisdiction"; but clearly no question of "jurisdiction" is presented when there is no proceeding or application before the agency.

The District Court's suggestion that such a "threshold question" is presented for agency determination because of the agency's authority "to proceed with regulatory action in the courts" totally misconceives the agency's role. Nothing in the Act or in the agency's regulations contemplates that the FDA make an administrative determination of an adjudicative fact as a prerequisite to its instituting civil or criminal enforcement actions in the courts. As this Court held in *Ewing* v. *Mytinger & Casselberry, supra,* even a statutory finding that there is probable cause to believe that the Act has been violated, and that public injury will result, is not an adjudication, but only a more formalized decision of the prosecutor. Absent such formal finding, it is even clearer that if the FDA concludes that a product is being illegally marketed because it is a "new drug" and no NDA has been filed, "that opinion is not adjudicatory, it is only the basis on which the FDA, as the prosecutor or initiator of either a seizure or injunction action in the district court, may invoke

the jurisdiction of that Court to determine . . . whether the drug challenged is a 'new drug'." *Id.* at p. 370; Joint App. 266.

In fact, the referral to the agency by the District Court returned to the prosecutor the task of judging the validity of charges already filed by him. As early as August 1969 the FDA had published its opinion as to the answer to the question returned to it for resolution, stating that its contemplated order "will cause any such drug on the market to be a new drug for which an approved new-drug application is not in effect . . . ." 34 Fed. Reg. 13674; Joint App. 227. The FDA had already advised Bentex Pharmaceuticals, Inc., that its drugs were new drugs and no longer marketable. Joint App. 254, n. 3. The agency's prosecutorial role, and the fact that it had already reached and publicly declared its opinion, also argues that the District Court was incorrect in concluding that the FDA was "the more able arbiter of the question." Joint App. 256.

The Government acknowledges that *CIBA*, the only case holding that it has authority to make an administrative determination as to whether a drug is a "new drug," "arose in the context of a proceeding for withdrawal or approval of an NDA." Brief for Petitioners, *Weinberger* v. *Bentex Pharmaceuticals, Inc., et al.*, No. 72-555, p. 49. However, the Government views this distinction as a procedural detail of no significance:

> "But even where the manufacturer has no NDA in effect or is not seeking approval for one, so that the determination of the 'new drug' question would not be ancillary to any proceeding specifically prescribed by the Act, a procedure is available where-

> by the agency may determine the issue. The Administrative Procedure Act expressly enables FDA, like any other administrative agency, to issue 'a declaratory order to terminate a controversy or remove uncertainty' (5 U.S.C. 554(e)). The present case [*Bentex*] illustrates an appropriate occasion for the exercise of the agency's declaratory order authority . . . ." *Id.* at pp. 49-50.

Of course, the fact that the agency could devise a procedure to conduct an adjudication would not remedy its lack of statutory authority to decide the question involved. However, in this instance, even the procedure it cites is not available to it.

Former Section 5(d) of the Administrative Procedure Act, now 5 U.S.C. § 554(e), which provides that "[t]he agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty," authorizes an agency to decide by declaratory order only questions which it is authorized to decide in the first place. *Boston & M.R.R.* v. *United States,* 162 F. Supp. 289, 293-294 (D. Mass. 1948), *appeal dismissed,* 358 U.S. 68 (1958). Moreover, 5 U.S.C. § 554 applies by its terms only in the "case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." This has never been in doubt. The following discussion appears in the *Attorney General's Manual on the Administrative Procedure Act,* 1947, p. 59:

> "This grant of authority to the agencies to issue declaratory orders is limited by the introductory clause of section 5 so that such declaratory orders are authorized only with respect to matters which are required by statute to be determined 'on the record after opportunity for an agency hearing'.

> In addition, if the subject matter falls within one of the numbered exceptions in the introductory clause of section 5, such as a matter in which an agency is acting as an agent for a court, section 5(d) does not apply. Sen. Rep. p. 18; H.R. Rep. p. 31 (Sen. Doc. pp. 204, 263) For example, where an agency is authorized after hearing to issue orders to cease and desist from specified illegal conduct, it may, under section 5(d), if it otherwise has jurisdiction, issue a declaratory order declaring whether or not specified facts constitute illegal conduct. On the other hand, while the Securities and Exchange Commission has long issued informal advisory interpretations through its principal officers as to whether a proposed issue of securities would be exempt from the registration requirements of the Securities Act, there is no statutory agency hearing procedure in which this question can be determined; if securities are sold without registration and the Commission believes that registration was required, it can only institute civil or criminal proceedings. Accordingly, section 5(d) does not authorize the Commission to issue declaratory orders as to whether particular securities must be registered under the Securities Act."

Both of the cases cited by the Government as analogous to its proposed use of a declaratory order (*Frozen Food Express* v. *United States,* 351 U.S. 40 (1956), and *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367 (1969)) involved orders relating to a matter that the agency had unquestioned authority to adjudicate. The Government's own statement of the holding in *Red Lion Broadcasting* reveals the basic limitation on the declaratory procedure: "... since FCC could have conducted adjudicatory proceedings ... 'it could, under the Administrative Procedure Act, have issued a declaratory order ....'"

Brief for Petitioners, *Weinberger* v. *Bentex Pharmaceuticals, Inc., et al.*, No. 72-555, p. 50.

Nothing better illustrates how tenuous is the Government's position than does its reliance on Section 5(d) (5 U.S.C. § 554(e)) to reinforce its claim that it has authority to make an administrative determination of new-drug status. This is not a determination which the FDA is authorized by statute to make, much less one "required by statute to be determined on the record after opportunity for an agency hearing." Thus the declaratory-order provision of the Administrative Procedure Act is not available to it for this purpose.[7]

The only procedural alternative to a declaratory order cited by the Government is that it might resort to "rule-making under Section 701(a) . . . to classify categories of drugs as generally recognized as safe and effective, rather than dealing with each drug separately." *Id.* at pp. 50-51. However, resort to this procedure is also denied to the agency under the statute.

B. The FDA Has No Authority To Decide This Issue by Rule-Making

One of the Government's principal arguments for reversal of the decision of the Court of Appeals in *Bentex* is totally unrelated to the question of whether

[7] Even if the declaratory procedure were to be used with respect to an NDA'ed drug, as an alternative to a proceeding to withdraw approval of the NDA under Section 505(e) of the Act, arguably it would not be available, because the determination involved would be within the exception made by Section 554(a)(1), as "a matter subject to a subsequent trial of the law and facts *de novo* in a court" in a seizure or injunction action. Were the question referred to the agency for initial determination by a court in which an action for a declaratory judgment was pending, the declaratory procedure would seem to be barred by the exception in Section 554(a)(5), as a case "in which the agency is acting as an agent for a court."

that court was correct in concluding that the FDA has no authority to determine in an administrative proceeding whether a drug which has never been the subject of a New Drug Application is a "new drug" as defined in the Act, and thus is being marketed illegally. In its brief in *Bentex,* the Government complains that the decision below would undermine its attempt to determine the same factual question through rule-making.

The Government asserts: "Denial of the power to pass upon questions of 'new drug' status * * * would seriously undermine FDA's program of reviewing the status of and establishing standards for over-the-counter drugs." Brief for Petitioners, *Weinberger* v. *Bentex Pharmaceuticals, Inc., et al.,* No. 72-555, p. 58. This program it describes as "a procedure for determining in substantive rule making, by therapeutic class, whether particular OTC products not covered by NDA's are generally recognized as safe and effective and not misbranded, under the standards of the Act" (*Id.* at p. 24), which would result in the issuance of regulations "which could thereafter be enforced in the courts as binding" (*Id.* at p. 25).

The Government's argument is thus stated in the "Introduction and Summary":

> "Moreover, the implications of the decision below extend beyond the area of prescription drugs involved in the present case. The agency's current program to review the over-the-counter drugs . . . would also be undermined by the court of appeals' rationale, since the agency would have no power to determine definitively, subject to judicial review, standards by which hundreds of thousands of drugs for which no NDA is in effect may

be classified as 'new drugs' or not. The agency would be required to pursue these products throughout the courts of the Nation in innumerable trials considering *de novo* issues that are best suited to administrative resolution and that may, indeed, already have been given careful consideration in administrative proceedings." *Id.* at pp. 36-37.

In contrast to this bleak prospect, the Government suggests that, if this Court holds that the agency has authority to determine new-drug status definitively, "FDA may, as in the case of over-the-counter drugs . . . , promulgate procedures for rule-making under Section 701(a) (21 U.S.C. 371(a)) to classify categories of [prescription] drugs as generally recognized as safe and effective, rather than dealing with each drug separately." *Id.* at pp. 50-51.

The Government's reference to its OTC review procedure to justify reversal of *Bentex* places both *amicus* and the Court in a difficult position. The issue of the agency's authority to make a binding determination as to a drug's new-drug status in a rule-making proceeding is not before the Court. The Government seeks premature validation of this rule-making procedure although it is fully aware that the agency's authority to make such determination through rule-making has been seriously challenged, and that the issue may ultimately have to be resolved by this Court.

In view of the Government's attempt to use the OTC regulations to support its argument in *Bentex, amicus* feels it has no alternative but to deal with the agency's lack of rule-making authority more fully than would otherwise be appropriate in these cases. It does so, not in an effort to induce the Court to decide an issue

which is not before it, but to seek to persuade the Court that neither the OTC review nor the prospect of the agency's resort to rule-making with respect to non-NDA'ed prescription drugs offers any reason to adopt the Government's position in *Bentex*.

The Government is correct in concluding that factual questions which the FDA is not authorized to decide, but which must be decided by the courts, cannot be decided by the FDA through rule-making. Moreover, not only does the agency lack adjudicatory authority, it is not authorized by the Act to issue substantive or legislative regulations, having the force of law, specifying which of the non-NDA'ed drugs on the market are generally recognized as safe and effective and not misbranded. It is hardly tenable to suggest that the Court should approve one unauthorized action to avoid undermining a second unauthorized action.

The procedure for the FDA's review of OTC drugs was published on May 11, 1972. 37 Fed. Reg. 9464 *et seq.* It is briefly described in the Government's Brief for Petitioners, *Weinberger* v. *Bentex Pharmaceuticals, Inc., et al.*, No. 72-555, at pp. 24-25. The general procedure established by these regulations is that OTC drugs will be classified into twenty-six broad, therapeutic categories. An advisory review panel will be appointed to review each category and will prepare proposed monographs defining conditions under which drugs in each category will be generally recognized as safe and effective and not misbranded. The industry will be invited to submit data to the panels, but the regulations specify standards of proof which the panels will apply. After review of the recommendations of the panels, the Commissioner will publish a tentative order

containing a proposed monograph to which objections may be filed. Thereafter he will publish a final monograph "establishing conditions under which a category of OTC drugs is generally recognized as safe and effective and not misbranded." These regulations are described in greater detail in the Appendix.

It is of course perfectly appropriate for the Commissioner to undertake a general review of OTC drugs now on the market, to secure the advice of panels of experts who have special training and experience in the use of particular categories of such drugs, and to afford interested parties an opportunity to present data and recommendations to those panels. Moreover, it is both appropriate and desirable for the Commissioner, after review of the recommendations of the panels, to set out in a public notice his opinion as to which formulations are and are not generally recognized as safe and effective, and as to which labeling claims are permissible. All this could be accomplished through publication of interpretive regulations, or guidelines, which would inform the industry as to the Commissioner's position and recommendations—the procedure generally and successfully used in the past.

The Proprietary Association believes that the extensive review which the FDA has undertaken could result in most of the problems which have been raised with respect to OTC drugs being resolved by agreement between the agency and the industry. The Proprietary Association has co-operated fully with the scientific panels which have been convened to date, and expects to continue to do so. However, from the first proposal of this procedure, both The Proprietary Association and the Pharmaceutical Manufacturers Asso-

ciation have objected that the agency has no authority to issue these monographs as binding regulations, having the force of law, and thereby oust the U.S. District Courts of jurisdiction to determine the factual questions which may be presented with respect to a particular drug which does not comply with the monograph.

In predicting that similar procedures may be adopted to classify categories of prescription drugs, which have never been the subject of an NDA, as generally recognized as safe and effective, the Government cites as its authority for proceeding in this way *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 147, 149-152 (1967), and *CIBA-Geigy Corporation* v. *Richardson,* 446 F.2d 466 (2d Cir. 1971). Brief for Petitioners, *Weinberger* v. *Bentex Pharmaceuticals, Inc., et al.,* No. 72-555, p. 51. These same decisions were cited by the Commissioner in his comments preceding the final regulations establishing the OTC review.

The Commissioner there asserts: "In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 151-152 (1967), the Supreme Court stated that regulations issued under 701(a) of the Act, if within the Commissioner's authority, 'have the status of law and violations of these carry heavy criminal and civil sanctions.'" 37 Fed. Reg. 9471. The quoted comment occurred in the course of the court's discussion as to whether the regulations there involved were ripe for review in an action for a declaratory judgment. The following extract is sufficient to recall the context of the Court's statement:

> "The Government argues, however, that the present case can be distinguished from cases like *Frozen Food Express* on the ground that in those instances the agency involved could implement its

policy directly, while here the Attorney General must authorize criminal and seizure actions for violations of the statute. In the context of this case, we do not find this argument persuasive. These regulations are not meant to advise the Attorney General, but purport to be directly authorized by the statute. Thus, if within the Commissioner's authority, they have the status of law and violations of them carry heavy criminal and civil sanctions. * * *

"This is also a case in which the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage. These regulations purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of all prescription drug companies; its promulgation puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate. As the District Court found on the basis of uncontested allegations, 'Either they must comply with the every time requirement and incur the costs of changing over their promotional material and labeling or they must follow their present course and risk prosecution.' 228 F.Supp. 855, 861." 387 U.S. at 151-52.

The Court's holding was obviously correct, but just as obviously did not determine the question of the agency's authority. The final monographs contemplated by these OTC regulations also "purport to be directly authorized by the statute," and "if within the Commissioner's authority, they have the status of law . . . ." The issue is whether they are what they purport to be, which depends upon whether they are within the Commissioner's authority.

The Commissioner also cites, in paragraph 85 of his comments (37 Fed. Reg. 9471-72), the following passage from the opinion in *CIBA-Geigy Corporation* v. *Richardson*, 446 F.2d 466 (1971):

> " . . . the Commissioner has the power to issue binding interpretative regulations, e.g., Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Indeed the particularization of a statute by rule-making is not only acceptable in lieu of protracted piecemeal litigation, e.g., Thorpe v. Housing Authority, 393 U.S. 268, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969), but it is the preferred procedure, e.g., Elman, A Note on Administrative Adjudication, 74 Yale L.J. 652, 654-55 (1965); see generally, Shapiro, The Choice of Rule Making or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921 (1965)." 446 F.2d at 468.

As will be apparent from the foregoing discussion, the Court did *not* hold in *Abbott* that "the Commissioner has the power to issue binding interpretative regulations," but only that the regulations there involved purported to be binding and to have the force of law.[8]

In those instances in which the Commissioner was intended to have legislative authority, the delegation

---

[8] The other cases cited by the court in *CIBA-Geigy* are not particularly relevant to the principle being asserted. The acceptability of rule-making in lieu of adjudication was neither the subject of nor discussed in the opinion in *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268 (1969). *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969), involved an attempt by the NLRB to make rules of "general . . . applicability and future effect" in an adjudicatory proceeding, without complying with the procedural requirements for rule-making imposed by 5 U.S.C. § 553. The case is discussed *infra*, p. 57.

of such authority in the Act was clear and unequivocal, and the violation of such regulations was made a prohibited act by Section 301 (21 U.S.C. § 331).

Section 401 of the Act, for example, authorizes the promulgation of regulations that establish a standard of quality for food. Sections 403(g) and (h) state that food which purports to be of a quality prescribed by regulations under Section 401 and which fails to comply with those standards is deemed misbranded and in violation of Section 301. A further example is found in Section 503(b)(3) which specifically provides that a prescription drug is deemed misbranded and in violation of the Act if it fails to include on the label various types of information required by regulations promulgated in accordance with Section 701(e).

Moreover, the legislative history of the Food, Drug, and Cosmetic Act emphasizes that in those instances in which Congress authorized the Commissioner to issue regulations having the force of law, it uniformly required that he afford affected parties an opportunity for an evidentiary hearing, and provided for judicial review on the record of such hearing. Thus, the House Committee Report on the 1938 Act states:

> "Section 701 relates generally to regulations. In the case of regulations, the violation of which constitutes an offense, it is required that appropriate notice of a public hearing be given and that adequate time shall be given after the promulgation of a regulation before it becomes effective." H.R. Rep. No. 2139, 75th Cong., 3d Sess. 9 (1938).

The statutory requirement for hearing is set out in Section 701(e) of the Act (21 U.S.C. § 371(e)). It provides that any regulation issued under certain specified sections of the Act be first published for comment, then

as a tentative order; that any person who will be adversely affected by such order may file objections thereto within thirty days and request a public hearing upon such objections; that the filing of such objections shall operate to stay the effectiveness of those parts of the order to which objections are made; that a public hearing must be held on the objections; and that the final order "shall be based on substantial evidence of record at such hearing and shall set forth, as part of the order, detailed findings of fact on which the order is based." Section 701(f) (21 U.S.C. § 371(f)) provides for judicial review of any final order issued under subsection (e) by the appropriate Court of Appeals, and provides that agency findings as to facts, if supported by substantial evidence, shall be conclusive.

The House Report thus described the applicability of these procedures:

> *"Procedure Governing Formulation and Judicial Review of Regulations*
>
> "Section 701(e), (f), and (g) of the committee amendment set forth the procedure governing the formulation and judicial review of certain regulations to be issued by the Secretary. These regulations include those with respect to the following matters: Establishing definitions and standards of identity, standards of quality, and standards of fill of container for foods (sec. 401); information on label concerning vitamin, mineral, and dietary properties of foods (sec. 403(j)); limitations on quantity of added poisonous or deleterious substances whose presence cannot be avoided by good manufacturing practice (sec. 406(a)); issuance of temporary permits governing manufacturing, processing, or packing so as to prevent contamination with micro-organisms (sec. 404(a)); prescribing appropriate tests on methods of assay to determine

strength, quality, or purity of drugs (sec. 501(b)); designation of drugs as habit-forming (sec. 502 (d)); directions on label as to use of drugs (sec. 502(f)); statements on label as to precautions necessary by reason of liability of drug to deterioration (sec. 502(h)); and listing of harmless coal-tar colors and certification of batches thereof for foods, drugs, or cosmetics (secs. 406(b), 504, and 604).

"Such regulations are not merely interpretive. They have the force and effect of law and must be observed. Their violation may result in the imposition of criminal penalties, or in the confiscation of the goods involved if shipped in interstate commerce, or in their exclusion from the country if imported." *Id.* at pp. 9-10.

When additional rule-making authority has been granted by subsequent amendments to the statute, Section 701(e) has been made applicable to such regulations or a comparable procedure has been provided. See, *e.g.*, Section 408 (21 U.S.C. § 346a) authorizing regulations relating to tolerances for pesticide chemicals used on raw agricultural commodities, and Section 409 (21 U.S.C. § 348) relating to permissible food additives.

Congress also made clear the nature and purpose of the hearing which it intended be afforded:

"If as a result of the hearing on any proposal the Secretary determines to issue, amend, or repeal the regulation, the action taken may be based only on substantial evidence of record at the hearing. Similarly, the action of the Secretary in failing to carry into effect any proposal for issuance, amendment, or repeal of a regulation set for hearing must rest on a like basis. In either instance de-

> tailed findings of the facts on which the action of the Secretary is based are required to be made public as a part of his order. It follows that if the order of the Secretary is to be valid, the Government must have placed in the record at the hearing its evidence in support of the action taken and thereby afford opportunity for persons affected to controvert viva voce the Government's evidence. While common law or jury trial rules of evidence need not be enforced at such a hearing, nevertheless it is essential to such a hearing that all the evidence on which the administrative officer acts be disclosed at the hearing and that the right to controvert viva voce be accorded. Cf. *Ohio Bell Tel. Co.* v. *Public Utilities Comm. of Ohio* (1937) 301 U.S. (preliminary print) 292." H.R. Rep. No. 2139, 75th Cong., 3d Sess. 9 (1938).

The legislative history of the hearing and review provisions of the Act were discussed at length by this Court in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967). The Court's comments are instructive:

> "The provisions now embodied in a modified form in § 701(f) were supported by those who feared the life-and-death power given by the Act to the executive officials, a fear voiced by many members of Congress. The supporters of the special-review section sought to include it in the Act primarily as a method of reviewing agency *factual* determinations. For example, it was argued that the level of tolerance for poisonous sprays on apple crops, which the Secretary of Agriculture had recently set, was a factual matter, not reviewable in equity in the absence of a special statutory review procedure. Some congressmen urged that challenge to this type of determination should be in the form of a *de novo* hearing in a district court, but the

> Act as it was finally passed compromised the matter by allowing an appeal on a record with a 'substantial evidence' test, affording a considerably more generous judicial review than the 'arbitrary and capricious' test available in the traditional injunctive suit." 387 U.S. at 143.

The Court concluded that the special-review procedures provided in Section 701(f) were intended to assure adequate judicial review of agency decisions expressed in "regulations embodying technical factual determinations." *Id.* at p. 144.

Thus, both the terms of the statute and its legislative history make clear that the Congress specifically enumerated the nature of the legislative regulations which could be issued by the Commissioner, and required that such regulations be issued only after hearing and be subject to special provisions relating to judicial review. Congress did not delegate legislative authority to the agency to issue regulations making a legally binding determination as to whether a drug is a "new drug" or as to whether it is "misbranded." Both the terms of the Act and its administrative and judicial interpretation since its enactment show that such factual questions were intended to be decided by the courts.

The OTC review procedure also raises serious questions of due process. The Commissioner not only proposes to make a conclusive determination of a factual question, which determination shall be binding on courts and not subject to "collateral attack" in a subsequent criminal, seizure, or injunctive action, but also proposes to make such a binding factual determination without affording an evidentiary hearing.

The Commissioner's final order establishing the OTC review procedure specifically asserts that such an evidentiary hearing is not required:

> "Neither the Administrative Procedure Act nor due process of law requires an evidentiary hearing. 5 U.S.C. 553 provides for a notice of proposed rule making, reference to the legal authority, and disclosure of the substance of the proposed rule. The agency must then give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments, with or without an opportunity for oral presentation. An evidentiary hearing is required under the Administrative Procedure Act only when it is required by other statutes." 37 Fed. Reg. 9472.

The argument apparently is that no hearing is required in a proceeding of this kind because the Federal Food, Drug, and Cosmetic Act does not require it. The answer to this argument is that the Act does not require a hearing in a proceeding of this kind because it does not authorize a proceeding of this kind.

Notice and hearing in a proceeding before an administrative agency may often be necessary to comply with the constitutional requirement of due process even though the statute governing the proceedings does not require a hearing. 2 Am. Jur. 2d, Administrative Law § 399; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950). As the court stated in *American Airlines* v. *Civil Aeronautics Board*, 359 F.2d 624 (D.C. Cir. 1966):

> "This court has indicated its readiness to lay down procedural requirements deemed inherent in the very concept of fair hearing for certain classes of cases, even though no such requirements had

been specified by Congress. Gonzalez v. Freeman, 118 U.S.App.D.C. 180, 334 F.2d 570 (1964); Pollack v. Simonson, 121 U.S.App.D.C. 362, 350 F.2d 740 (1965)." 359 F.2d at 632.

The court noted that the report of the Senate Judiciary Committee on the Administrative Procedure Act had observed that some cases "tend to be accusatory in form and involve sharply controverted factual issues. Agencies should not apply the exceptions [from the hearing requirement] in such cases, because they are not to be interpreted as precluding fair procedure where it is required." 359 F.2d at 632, n. 22.

Earlier decisions of this Court often explained when an evidentiary hearing was required by due process in terms of whether (1) the proceeding was "rule-making" and the agency was acting in a "legislative" capacity, or (2) the proceeding was "adjudication" and the agency was acting in a "judicial" capacity—due process requiring an evidentiary hearing in the latter case.[9] However, courts are increasingly recognizing that the governing distinction is whether the agency is determining or acting on the basis of "legislative facts" or "adjudicative facts."

The terminology was first suggested by Professor Kenneth Culp Davis,[10] who thus summarized the effect of prior court decisions in his treatise:

> "The true principle is that a party who has a sufficient interest or right at stake in a determination of governmental action should be entitled to an

---

[9] See, *e.g.*, *The Assigned Car Cases*, 274 U.S. 564 (1927).

[10] Davis, "An Approach to Problems of Evidence in the Administrative Process," 55 Harv. L. Rev. 364, 404-407 (1942).

> opportunity to know and to meet, with the weapons of rebuttal evidence, cross examination, and argument, unfavorable evidence of adjudicative facts, except in the rare circumstance when some other interest, such as national security, justifies an overriding of the interest in fair hearing." 1 Davis, *Administrative Law Treatise*, § 7.02, p. 412 (1958).

Professor Davis describes the distinction as follows: "Adjudicative facts are the facts about the parties and their activities, businesses, and properties. * * * Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion." *Id.* at p. 413.

This distinction between adjudicative and legislative facts is illustrated by the decisions of this Court in *Londoner* v. *City & County of Denver,* 210 U.S. 373 (1908), and in *Bi-Metallic Inv. Co.* v. *State Bd. of Equalization*, 239 U.S. 441 (1915). The distinction was recognized in *Gonzales* v. *United States,* 348 U.S. 407, 412 (1955). In considering whether a party is entitled to know and to meet information used by a tribunal, the Court distinguished some cases on the ground that "they do not involve individualized fact finding and classification, but legislative determinations, political judgments, and the exercise of judicial discretion. . . ." 348 U.S. at 412. More recent cases in the lower courts have been more explicit in contrasting "legislative" and "adjudicative" facts. See, *e.g., Hornsby* v. *Allen,* 326 F.2d 605 (5th Cir. 1964); *American Airlines* v. *Civil Aeronautics Board,* 359 F.2d 624 (D.C. Cir. 1966); *Utica Mutual Ins. Co.* v. *Vincent,* 375 F.2d 129 (2d Cir. 1967); *U.S. Rubber Co.* v. *NLRB,*

373 F.2d 602, 605 (5th Cir. 1967); and *Powelton Civic Home Owners Assn.* v. *Dept. of Housing and Urban Development,* 284 F.Supp. 809 (E. D. Pa. 1968).[11]

The facts which the Commissioner purports to have authority to determine are clearly adjudicative. He proposes to determine whether a particular drug is generally recognized as safe or effective and whether its labeling is false or misleading. These are clearly "facts about the parties and their activities, businesses, and properties." Davis, *supra,* p. 46. They "involve individualized fact finding and classification." *Gonzales* v. *United States, supra,* p. 46. While "couched as rule making, general in scope," such a determination "in substance and effect is individual in impact and condemnatory in purpose." *American Airlines* v. *Civil Aeronautics Board, supra,* p. 46.

In fact, it is generally true that "the need for an evidentiary hearing [is] present when it is proposed to apply a statute couched in general terms. . . ." *Superior Oil Co.* v. *F.P.C.,* 322 F.2d 601, 614 (9th Cir. 1963), *cert. denied,* 377 U.S. 922 (1964). For example, in *Denver Union Stock Yard Co.* v. *Producers Livestock Marketing Association,* 356 U.S. 282, 287 (1958), this Court observed, "When an Act condemns a practice that is 'unfair' or 'unreasonable,' evidence is normally necessary to determine whether a practice, rule, or regulation transcends the bounds. See *Associated Press* v. *Labor Board,* 301 U.S. 103; *Chicago Board of Trade* v. *United States,* 246 U.S. 231; *Sugar Institute* v. *United States,* 297 U.S. 553." Thus, the determination

[11] The distinction has also been specifically adopted as the basis for the provisions concerning judicial notice in the "Rules of Evidence for United States Courts and Magistrates."

of whether a particular course of conduct is fraudulent or unfair, or a particular statement is false or misleading—one of the determinations being made in the OTC review—is a determination of "adjudicative facts," and an evidentiary hearing is required by due process. See, *e.g., U.S. Rubber Co.* v. *NLRB, supra,* p. 605; *S.E.C.* v. *Frank,* 388 F.2d 486 (2d Cir. 1968); *NLRB* v. *Smith Industries,* 403 F.2d 889 (5th Cir. 1968).

The necessity for an evidentiary hearing is also clear if one applies the traditional test in which private right is balanced against public purpose. As the Court stated in *Cafeteria & Restaurant Workers Union* v. *McElroy,* 367 U.S. 886, 895 (1961), "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

The rule-making involved in the OTC review seeks to bar from the market drugs whose margin of safety is such that they are permitted to be sold over the counter, rather than being required to be dispensed on prescription. Most have been on the market for many years, and were specifically exempted by the 1938 and 1962 "grandfather" clauses from the strict regulatory control applicable to most prescription drugs. Even the drugs so exempted have been subject since 1938 to being seized, condemned, and barred from commerce if their labeling was false and misleading in any respect. The rule-making authority being asserted by the FDA, if it exists at all, has existed since 1938. Clearly, there is no such urgency or public health hazard as would constitute "the rare circumstance

when some other interest . . . justifies an overriding of the interest in fair hearing." Davis, *supra,* p. 46.

As discussed *supra,* pp. 38-43, in those instances in which the Commissioner has been authorized by the Act to issue regulations making similar factual determinations, the Congress has consistently required that he afford affected parties an opportunity for an evidentiary hearing, and has provided for judicial review on the record of such hearing. Thus, even where more serious health hazards might be involved, Congress has not found an overbalancing public interest requiring that fair hearing be denied.

The clear trend of recent court decisions is to afford increasing protection to private rights by requiring an evidentiary hearing where the principal argument against it is, as here, one of administrative convenience. See, *e.g., Goldberg* v. *Kelly,* 397 U.S. 254 (1970); *Bell* v. *Burson,* 402 U.S. 535 (1971); *Escalera* v. *New York Housing Authority,* 425 F.2d 853 (2d Cir. 1970), *cert. denied,* 400 U.S. 853 (1970); and *Caulder* v. *Durham Housing Authority,* 433 F.2d 998 (4th Cir. 1970), *cert. denied,* 401 U.S. 1003 (1970). In fact, *Bell* has been read as broadly as holding "that where the government has issued a benefit to an individual, whatever that benefit may be, it will take more than administrative and fiscal considerations to suspend or terminate that benefit without a prior hearing." Project, Federal Administrative Law Developments—1971, 1972 Duke L. J. 115, 168.

III. Section 107(c) of the Drug Amendments of 1962 Neither Extends FDA's Authority Over Drugs Which Have Never Been the Subject of a New Drug Application Nor Terminates Its Authority To Withdraw Approval of a New Drug Application

A. The Provisions and Legislative History of Section 107(c) of the Drug Amendments of 1962

The Government, as petitioner in *Bentex* and as respondent in *Hynson* and *USV*, urges that paragraph (4) of Section 107(c) of the Drug Amendments of 1962 (Public Law 87-781, 76 Stat. 788-789, 21 U.S.C. § 321 note; Joint App. 481-482) operates to extend FDA's authority to cover drugs which have never been the subject of a New Drug Application. The cross-petitioner in *Hynson* apparently urges that the same paragraph terminates the FDA's authority to withdraw its approval of a New Drug Application. Both claims are completely unsupported, either by the literal terms of that paragraph or by the legislative history.

While it is possible in the case of every statute as complex as the Food, Drug, and Cosmetic Act and its 1962 Amendments to argue *ad infinitum* as to whether the statute carried out the express intentions of its sponsors, or whether their comments about it on the Senate or House floor accurately described its contents, the basic reference must necessarily be what the statute itself says. We submit that the provisions of Section 107(c) are neither complex nor obscure.

The 1938 Act prior to its amendment in 1962 had not provided for administrative approval of a New Drug Application; rather, it provided that such application "shall become effective" within a specified period after filing unless the Secretary should "issue an order refusing to permit the application to become

effective." § 505, 52 Stat. 1052; Joint App. 483-484. Section 107(c)(2) of the 1962 Amendments provides that such application "which was 'effective' within the meaning of that Act on the day immediately preceding the enactment date [of the amendments] shall be deemed as of the enactment date, to be an application 'approved' by the Secretary within the meaning of the basic Act as amended . . . ."

Section 107(c)(3) provides that "[i]n the case of any drug with respect to which an application . . . is deemed to be an approved application on the enactment date by virtue of paragraph (2)," the amendments with respect to effectiveness made in the definition of a "new drug" and in the provisions relating to approval of a New Drug Application shall not apply "so long as approval of such application is not withdrawn," unless new claims are made for the drug; and that the FDA may not withdraw approval of such application on grounds of lack of effectiveness for two years.

Section 107(c)(4) provides that the amendments to the definition of a "new drug" made by the amendatory statute shall not apply to any drug which on the day immediately preceding the enactment of the amendments "(A) was commercially used or sold in the United States, (B) was not a new drug as defined [in] the basic act as then in force, and (C) was not covered by an effective application under section 505 of that act."

The distinction apparently made by these provisions is between a drug previously marketed on the basis of proof of safety for which a New Drug Application "was 'effective'," on the one hand, and a drug previously marketed on the basis of the general recogni-

tion of its safety for which no New Drug Application was "effective," on the other hand. In other words, drugs legally on the market with a New Drug Application were to be governed by Section 107(c)(3), and drugs legally on the market without a New Drug Application were to be governed by Section 107(c)(4). That this was the distinction in fact intended by Congress is borne out by the legislative history.

Section 107(c) of the 1962 Amendments is identical to Section 8(g) of the bill S. 1552 as reported by the Senate Committee on the Judiciary on August 21, 1962. This was the third version of S. 1552. The bill originally introduced by Senator Kefauver was first reported by the Judiciary Committee substantially amended on July 19, 1962. It was the third version as reported by the committee on August 21, 1962, which was subsequently considered and passed by the Senate. The committee's report contained the following explanation of its amended Section 8(g), which became Section 107(c) in the statute as finally enacted:

> "Section 8 of the bill, dealing with 'effectiveness,' contained no transitional provisions relating to the application of these amendments to drugs already on the market.
>
> "The committee amendment would insert detailed transitional provisions. Under the amendment, *a drug which is on the market and has gone through the new-drug procedure* would not have to be resubmitted for clearance of existing label claims with respect to effectiveness of the drug unless approval of the new drug is withdrawn or suspended under the act or unless an amendment or supplement to the effective new-drug application is filed (in which event only the changed labeling would be reevaluated).

"Secondly, under this transitional provision the new grounds for withdrawing approval of a new drug already on the market under the new authority relating to drug effectiveness would not apply until 2 years after the bill is enacted unless approval of the new drug is withdrawn or suspended earlier on other grounds.

"Thirdly, in the case of *a drug on the market which was never subject to the new-drug procedure* before, the amendments to the new-drug definition relating to drug effectiveness would not apply to existing labeling claims." (Emphasis added.) S. Rep. No. 1744, Part 2, 87th Cong., 2d Sess. 7-8 (1962).

The "Statement of the Managers on the Part of the House" included in the Conference Report shows that the House conferees agreed to the Senate language on the basis of the same understanding of its meaning:

"The Senate version, with respect to amendments relating to the effectiveness of drugs, contained provisions preventing their application to *previously approved drugs* except with respect to changed uses or conditions of use recommended in their labeling, so long as approval of the application is not suspended or withdrawn. The Senate version also provided that until either the expiration of 2 years after the enactment of the bill, or until the effective date of an order under section 505(e) of the Federal Food, Drug, and Cosmetic Act withdrawing or suspending the approval of an application, the new 'lack of substantial evidence of effectiveness' test for withdrawal of new-drug approval shall not apply.

"The conference substitute adopts the Senate version and also contains the Senate language providing with respect to existing labeling claims of *drugs that have never previously been subject to*

will not be affected by the new effectiveness test insofar as their existing claims are concerned." 108 Cong. Rec. 17366, quoted in Brief for Petitioners, *Weinberger* v. *Bentex Pharmaceuticals, Inc., et al.*, No. 72-555, p. 14, fn. 32. Senator Kefauver, the author of the original bill, speaking next on the Senate floor, stated that the Chairman "has accurately defined the provisions of the substitute which was reported on August 21." 108 Cong. Rec. 17367.

The most that can be said for the FDA's contention is that it must mark a new high in agency ingenuity. Obviously drugs which were never covered by an application at all—*i.e.*, drugs for which no application was ever filed and thus for which no application could possibly become "effective"—were "not covered by an effective application." As the Court of Appeals stated in its opinion in *USV*, drugs "which were generally recognized as safe and were marketed as 'old drugs' without an approved NDA on October 9, 1962, * * * [meet] literally the criteria for exemption stated in the 'grandfather clause.'" *USV Pharmaceutical Corporation* v. *Richardson*, 461 F.2d 223, 228 (4th Cir. 1972); Joint App. 470.

The total invalidity of the Government's theory on the basis of the structure of the statute, the specific provisions and history of Section 107(c)(4), the agency's consistent and contrary interpretation over many years, and the procedural and due-process problems it would create have all been thoroughly treated in the Brief for Petitioner in No. 72-666, *USV Pharmaceutical Corporation* v. *Weinberger*, pp. 26 *et seq.* There is no need for *amicus* to repeat these arguments. However, several additional comments are appropriate.

What the agency attempted in *Bentex* and *USV* was similar to the process which this Court condemned in *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969). The FDA attempted to make rules of "general . . . applicability and future effect" in an adjudicatory proceeding, without complying with the procedural requirements for rule-making imposed by 5 U.S.C. § 553. The FDA sought to make generally applicable to all manufacturers a factual determination with respect to a particular drug made in an adjudicatory proceeding to which only that drug's manufacturer was a party. This Court's comments in *Wyman-Gordon* are applicable:

> "The rule-making provisions of that Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application. * * * They may not be avoided by the process of making rules in the course of adjudicatory proceedings. There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention. Apart from the fact that the device fashioned by the Board does not comply with statutory command, it obviously falls short of the substance of the requirements of the Administrative Procedure Act." 394 U.S. at 764.

After these cases arose, the FDA recognized the necessity to comply with the basic notice provisions of the Administrative Procedure Act. On October 31, 1972, it adopted a new regulation as § 130.40 of Title 21 of the Code of Federal Regulations, entitled "Applicability of Drug Efficacy Study Implementation Notices and Notices of Opportunity for Hearing to Identical, Related, and Similar Drug Products." 37 Fed. Reg. 23187.

Subsection (a) of the new 21 C.F.R. § 130.40 states:

> "The Food and Drug Administration's conclusions on the effectiveness of drugs are currently being published in the Federal Register as Drug Efficacy Study Implementation (DESI) Notices and as Notices of Opportunity for Hearing. The specific products listed in these notices include only those that were introduced into the market through the new-drug procedures from 1938-62 and were submitted for review by the National Academy of Sciences-National Research Council (NAS-NRC), Drug Efficacy Study Group. Many products which are identical to, related to, or similar to the products listed in these notices have been marketed under different names or by different firms during this same period or since 1962 without going through the new-drug procedures or the Academy review. Even though these products are not listed in the notices, they are covered by the new drug applications reviewed and thus are subject to these notices. All persons with an interest in a product that is identical, related, or similar to a drug listed in a drug efficacy notice or a notice of opportunity for a hearing will be given the same opportunity as the applicant to submit data and information, to request a hearing, and to participate in any hearing."

Of course, the agency's recent attempt to comply with the Administrative Procedure Act does not cure the basic defect that non-NDA'ed drugs were not "covered by the new drug applications reviewed," and thus are entitled to the protection of Section 107(c)(4). However, serious problems would be presented, even were the Court to adopt the Government's bizarre interpretation of the latter section. The new regulation continues:

> "It is not feasible for the Food and Drug Administration to list all products which are covered by

an NDA and thus subject to each notice. However, it is essential that the efficacy conclusions be applied to all identical, related, and similar drug products to which those conclusions are reasonably applicable. Any product not in compliance with an applicable drug efficacy notice is in violation of section 505 (new drugs) and/or section 502 (misbranding) of the act. * * * Where experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs would conclude that the findings in a drug efficacy notice or notice of opportunity for hearing concerning effectiveness are applicable to an identical, related, or similar drug product, such product is affected by the notice. A combination drug product containing an identical, related, or similar drug is also subject to the conclusions contained in the notice."

What this illustrates is that the whole concept of "me-too" drugs is so imprecise and speculative that no adequate notice is really possible. "Identical" is a precise adjective. "Similar" is less precise. "Related" is vaguer still. But to regard a "combination drug product containing an identical, related, or similar drug" as one of its ingredients as a "me-too" drug stretches the concept to include almost everything. In fact, the FDA's new theory has been asserted to deny the marketability of a drug, none of the ingredients of which are the same as those in the "pioneer drug" subject to the NDA, but which is intended for the same therapeutic purposes.

The Government explains the FDA's motivation for devising its new interpretation of the statute as follows:

"The agency believed that it would be inconsistent and unjust to drug manufacturers and to the

> public to construe the Act as requiring manufacturers of the 'pioneer' drugs, who had filed an NDA, to produce substantial evidence of effectiveness or lose their marketing approval, while at the same time permitting 'me-too' drugs, which owed their marketability to the pioneer NDAs, to remain on the market without demonstrating effectiveness." Brief for Petitioners, *Weinberger* v. *Bentex Pharmaceuticals, Inc., et al.*, No. 72-555, p. 19.

It should be observed, *first,* that the agency's belief that the 1962 Amendments produced "inconsistent and unjust" results does not justify the Act's judicial amendment to produce a result directly the opposite of that which the statute commands. Such amendment is properly sought in the Congress. *Second,* drugs on the market without an approved New Drug Application do not "[owe] their marketability to the pioneer NDAs." Those which were on the market prior to 1962 "owe their marketability" to the general recognition of their safety. Those introduced since 1962 "owe their marketability" to the general recognition of their safety and effectiveness. If they lack the requisite general recognition, or if their labeling is false or misleading, they are subject to seizure, their distribution can be enjoined, and their manufacturers are subject to criminal penalties.

The fact that non-NDA'ed drugs are subject to these sanctions suggests that there is nothing "inconsistent and unjust" inherent in the provisions of the Act, but only in the way that the Government chooses to describe them. As discussed *infra,* pp. 70-72, there is no question that drugs marketed under an NDA are required to meet a higher standard, particularly with reference to proof of effectiveness, than are non-NDA'ed drugs. However, they also benefit from significant protective provisions. It is in this light, too, that

Section 505(e) should be viewed. For example, Section 505(e), as amended in 1962, provides an administrative alternative to seizure or injunction to correct false and misleading labeling of an NDA'ed drug. This provision is thus described in the Senate Report on the 1962 Amendments:

> "The proposed committee amendment would also amend the provision in the bill which directs the Secretary to withdraw a new-drug approval if he finds that the labeling is false or misleading by placing the provision among the discretionary provisions for withdrawal, and would permit withdrawal of approval only if the labeling was not corrected within a reasonable time after notice from the Secretary. This would give greater flexibility to the Food and Drug Administration and give the manufacturer an opportunity to remedy the defect before withdrawal action is taken." S. Rep. No. 1744, Part 2, 87th Cong., 2d Sess. 7 (1962).

Thus, not only is the inconsistency one which Congress knowingly created, but also it is not as unjust as the Government suggests.

C. Section 107(c) of the Drug Amendments of 1962 Does Not Exempt a Drug Which Has Been the Subject of a New Drug Application From an Administrative Proceeding To Withdraw Approval of That Application

As *amicus* has already emphasized, *Hynson* presents a different question from that presented in *Bentex,* because the drug involved in *Hynson* had been the subject of a New Drug Application and the issue between the manufacturer and the FDA arose as the result of the FDA's instituting an administrative proceeding to withdraw approval of the NDA which had "become effective" prior to 1962.

Faced with a notice of the FDA's intention to withdraw approval of the NDA covering its drug, the manufacturer in *Hynson* first filed an action for a declaratory judgment seeking a judicial determination as to whether the drug was still a "new drug." The District Court held that the issues presented were within the primary jurisdiction of the FDA and that the manufacturer had failed to exhaust its administrative remedies, and dismissed the action. No appeal was taken. Instead, the manufacturer asked for a hearing on the issue in the administrative proceeding to withdraw approval of the NDA. The FDA denied the request for a hearing and issued a final order of withdrawal. The Court of Appeals reversed, on the ground that the FDA was required to hold a hearing on a question not directly relevant here. The manufacturer, as cross-petitioner in No. 72-414, argues that in the hearing on whether to withdraw approval of the NDA, the FDA must first determine whether the drug involved is exempt from administrative withdrawal proceedings because of the provisions of Section 107(c) of the 1962 Amendments. Thus *Hynson* presents the question whether the manufacturer is entitled to an administrative determination of that question in a proceeding to withdraw approval of an NDA.[12]

The contention of the cross-petitioner in *Hynson*, that it is entitled to an initial determination in an administrative proceeding to withdraw the NDA as to whether its drug is exempt from such proceedings because of Section 107(c) of the 1962 Amendments, is

[12] The manufacturer in *Hynson* also argues that in the proceeding to withdraw approval of the NDA it is entitled to an administrative determination as to whether the drug is generally recognized as safe and effective. This question is discussed *infra*, pp. 65 *et seq.*

disposed of easily. This Court should determine as a matter of law that Section 107(c) cannot exempt a drug from administrative proceedings to withdraw approval of its NDA. This result is compelled by the structure of the "grandfather" clause. The only limitations placed by Congress on the right of the FDA to withdraw its approval of an NDA are contained in Section 107(c)(3), the paragraph applicable to drugs for which such application had been filed. No limitations were placed on the FDA's right to withdraw an NDA in Section 107(c)(4), because by its terms it does not apply to drugs subject to an NDA.

The Court of Appeals in its opinion in *USV* concluded: "The Congress never intended that a drug being marketed under an approved NDA might qualify under the 'grandfather clause.' This is plain from the comment in the Conference Committee Report that the exemption was to apply 'to existing labeling claims of drugs *that have never previously been subject to the new-drug procedure'*. (Italics added.)" *USV Pharmaceutical Corporation* v. *Richardson,* 461 F.2d 223, 227 (4th Cir. 1972); Joint App. 470. As discussed *supra,* pp. 50-54, this is obviously a correct reading of the legislative history.

This interpretation of Section 107(c), in addition to being compelled by its literal terms and history, has the virtue of eliminating further protracted controversy, either in the courts or in administrative proceedings, as to the status of drugs marketed before 1962. A given drug was either marketed pursuant to a New Drug Application or it was not. If it was, its "grandfather" rights are fixed by Section 107(c)(3). If it was not, its "grandfather" rights are fixed by Section

107(c)(4). No drug is exempted from a proceeding to withdraw approval of its NDA by Section 107(c). If a drug has been the subject of an NDA it is not covered by Section 107(c)(4), and the two-year moratorium granted by Section 107(c)(3) has expired.

The cross-petitioner in *Hynson* argues that in the administrative proceeding to withdraw its NDA the FDA must determine, after a hearing required by due process, whether the drug involved "is exempt from *administrative* withdrawal proceedings because of Section 107(c)(2) of the 1962 Amendments or from both *administrative* and *judicial* withdrawal proceedings by reason of Section 107(c)(4) of the amendments . . . ." Brief of Cross-Petitioner, *Hynson, Westcott and Dunning, Incorporated* v. *Weinberger*, No. 72-414, p. 12. If by "withdrawal proceedings" the cross-petitioner means a proceeding to withdraw approval of the NDA, it follows from the foregoing discussion that (1) nothing is exempted from anything by Section 107(c)(2); (2) no drug which was marketed pursuant to an NDA is exempted from administrative proceedings to withdraw that NDA by Section 107(c)(4); and (3) there are no "judicial withdrawal proceedings" provided in the Act from which to be exempted.

If by "withdrawal proceedings" the cross-petitioner means any proceeding which would result in his having to "withdraw" the drug from the market—*i.e.*, civil actions to seize and condemn the drug or enjoin its distribution—it obviously is not "exempt" from such proceedings, although if its drug is "generally recognized as safe and effective" it may have the right to continue to market the drug. It is this question which *amicus* will next discuss.

IV. The FDA's Statutory Authority To Withdraw a New Drug Application Does Not Depend on a Prior Determination That the Subject Drug Is Not Generally Recognized as Safe and Effective

A. Introduction

Both the drug involved in *Hynson* and that involved in *CIBA* had been the subjects of New Drug Applications, and the issues as to their marketability arose as a result of the FDA's instituting administrative proceedings to withdraw its prior approvals of the NDA's involved. However, there are significant differences between the issues posed in *Hynson* and those in *CIBA*.

As discussed *supra,* p. 62, the manufacturer in *Hynson* sought a hearing before the agency. The FDA denied its request for hearing and issued a final order withdrawing approval of the NDA. Although the Court of Appeals reversed, the manufacturer here argues that on remand the FDA should be required to determine whether its drug is still a "new drug" under the Act. It argues that if its drug has become "generally recognized as safe and effective" it is no longer a "new drug," and seems to conclude from this that the agency has no authority to withdraw its prior approval of the NDA. In any event, it argues for an administrative determination of the question of new-drug status.

The manufacturer in *CIBA* filed an action for a declaratory judgment determining whether its drug is still a "new drug." Before the cause was heard in the District Court, the FDA's order withdrawing approval of the NDA had been issued. The District Court then dismissed the declaratory judgment action on the ground that even if it had jurisdiction it would exercise its discretion and refuse to determine whether the drug was a "new drug." The Court of Appeals affirmed the

dismissal. The manufacturer complains of this action and seeks to have the case remanded to the District Court. Thus *CIBA* presents the question whether the manufacturer is entitled to a judicial determination, after an NDA has been withdrawn, as to whether its drug is no longer a "new drug," and so can be legally marketed despite the withdrawal of the NDA.

The "threshold question" presented by these cases is not a factual one but a legal one: Whether a drug which was once a "new drug," and was originally marketed pursuant to a New Drug Application, may subsequently become "generally recognized as safe and effective" and thus cease to be a "new drug." The latter construction has been adopted by officials of the FDA in the past and appears to be accepted by the Government.

If a drug's new-drug status is permanently established for regulatory purposes when it is first marketed under an NDA, there can be no question that the FDA has authority, upon proper findings, to withdraw approval of the NDA. If, as a matter of law, the only inquiry is whether a New Drug Application ever became effective or was approved, the issue of new-drug status clearly does not arise in the administrative proceeding to withdraw that approval, nor does it arise in a subsequent judicial proceeding. The drug is simply a "new drug," without an approved NDA, and cannot be legally marketed.

If, on the other hand, the regulatory status of a drug originally marketed pursuant to an NDA can subsequently change if it becomes "generally recognized as safe and effective," the subsidiary questions posed in *Hynson* and *CIBA* do arise. We assume, *arguendo*, that they do.

B. The Issue in Hynson

The question whether a drug has become "generally recognized as safe and effective" is not an issue in a proceeding to withdraw approval of the earlier NDA unless such general recognition terminates the authority or responsibility of the FDA to withdraw such approval. We believe that the proper construction of the statute is that the subsequent general recognition of a drug's safety and effectiveness does not affect the withdrawal proceeding and is not an issue in such proceeding.

The provisions of Section 505(e), 21 U.S.C. § 355(e), are by their terms mandatory. The section provides: "The Secretary *shall* . . . withdraw approval of an application with respect to a new drug under this section if the Secretary finds (1) . . . that such drug is unsafe . . . ; (2) . . . that such drug is not shown to be safe . . . ; (3) . . . that there is lack of substantial evidence that the drug will have the effect it purports or is represented to have . . . ; or (4) that the application contains any untrue statement of a material fact."

While the statute provides that if any of these four findings are made the Secretary "shall . . . withdraw approval," in other situations his action is discretionary. The section continues: "The Secretary *may* also . . . withdraw the approval of an application" if he finds that the applicant has failed to maintain adequate records or to make required reports, or if he finds inadequacies in the methods, facilities, or controls used by the manufacturer, or if he concludes that the labeling of such drug is false or misleading and this is not corrected after reasonable notice.

Congress was fully aware of the distinction made in the section between those circumstances in which withdrawal of approval was mandatory and those in which it was discretionary. The Senate Report on the 1962 Amendments states: "The proposed committee amendment would also amend the provision in the bill which directs the Secretary to withdraw a new-drug approval if he finds that the labeling is false or misleading by placing the provision among the discretionary provisions for withdrawal. . . ." S. Rep. No. 1744, Part 2, 87th Cong., 2d Sess. 7 (1962).

Nothing in the Act provides that, if the drug has become "generally recognized as safe and effective," the agency is relieved of its mandatory duty to withdraw approval of an NDA. Moreover, the fact that Congress in the 1962 Amendments placed a specific limitation on the agency's right to withdraw approval argues that it intended no such general limitation as that being considered here. Section 107(c)(3)(B) provided that clause (3) of the first sentence of Section 505(e), requiring withdrawal of approval of an application if the Secretary finds that there is a lack of substantial evidence of effectiveness, should not apply to a drug subject to an effective NDA on the date of the amendment until two years after the amendment, or until approval was withdrawn on other grounds than those of lack of effectiveness. § 107(c) of Public Law 87-781, 76 Stat. 788-789 (1962), 21 U.S.C. § 321 note; Joint App. 482. Nothing suggests that Congress intended any further limitation on the agency's authority.

Since the 1962 Amendments became fully effective, in order to obtain approval of an NDA and in order to retain that approval the manufacturer must submit "substantial evidence that the drug will have the effect it purports or is represented to have." § 505(d)(5) and

(e)(3), 21 U.S.C. § 355(d)(5) and (e)(3). As used in those subsections, " 'substantial evidence' means evidence consisting of adequate and well-controlled investigations including clinical investigations by experts qualified by scientific training and experience to evaluate the effectiveness of the drug involved, on the basis of which it could fairly and responsibly be concluded by such experts that the drug will have the effect it purports or is represented to have. . . . " § 505(d), 21 U.S.C. § 355(d).

From the time that the bill as passed was originally reported in 1962, this new standard has been cited as one of the major changes made by the 1962 Amendments. The history of the requirement of "substantial evidence" in those amendments is reviewed in the Government's Brief for Petitioners in No. 72-394, *Weinberger* v. *Hynson, Westcott and Dunning, Inc.*, at pp. 14-17. The Government concludes: "Thus the history of the 'substantial evidence' provisions of the Act shows increasingly stringent statutory language culminating in the provision that is now the law." *Id.* at p. 17.

Originating in recommendations from the medical and scientific community, this change ultimately involved a substantial segment of that community in the massive Drug Efficacy Study conducted for the FDA by the National Academy of Sciences-National Research Council. It is implicit in the history of the 1962 Amendments and in the sweeping review of drugs which was instituted following their enactment that the medical and scientific community is entitled to assume that if the NDA covering a particular drug has not been withdrawn it is because that drug meets the new stringent standard for proof of effectiveness. It would be a strange result indeed if, in the absence of sub-

stantial evidence of effectiveness, the agency could still not withdraw its approval of the NDA because the drug meets the different standard involved in "general recognition of safety and effectiveness."

That it is a different standard is well-settled. The nature of the difference is clearly stated in the opinion of the Court of Appeals in *Bentex:*

> "[W]hen filed, the application puts in issue only one question: Is the article safe and effective? That and that alone is the issue to be considered by the Secretary in connection with an application for approval filed by a manufacturer under Section 355(d), 21 U.S.C. That issue is quite different from that presented when there is an issue whether a drug fits the statutory definition of 'new drug' in the Act. The criterion for ascertaining whether a product is within statutory definition of 'new drug' under the Act is not safety and effectiveness *per se,* which, as we have observed, is the issue before the Secretary in connection with application for approval of a 'new drug', but 'whether the government has shown by a preponderance of the evidence that the "drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, as safe and effective for use under the conditions prescribed, recommended or suggested in the labeling thereof."' " 463 F.2d 363, 371-372; Joint App. 268-269.

As the court observed in *United States* v. *Article of Drug, etc.,* 415 F.2d 390, 392 (5th Cir. 1969), in determining whether a drug is generally recognized as safe and effective, "the nature of expert opinion about [the drug], and not its actual safety or effectiveness, is the ultimate fact issue."

Moreover, the issue as to whether there is general recognition of a drug's safety and effectiveness does not involve the kind of scientific expertise required to determine whether a clinical study is "adequate and well-controlled." Rather, as the Court of Appeals observed in *Bentex,* whether a drug is generally recognized as safe and effective "is an issue that must be and is resolved, sometimes with, and at other times without a jury, in practically every injunctive, seizure, or criminal proceeding under the Act." 463 F.2d at 372; Joint App. 269.

The Government, attempting to support its claim that determination of general recognition should be shifted from the courts to the agency, asserts in its brief in *Bentex:*

> "Indeed, it is the position of FDA that as a general proposition there can be no general recognition of safety and effectiveness by experts where 'substantial evidence' of effectiveness as defined by Congress is lacking. In other words, the kind of scientific support for claims of efficacy required to obtain approval of an NDA is generally a necessary condition to avoidance of 'new drug' status (although not necessarily a sufficient condition, since a drug can be proved efficacious without there being a general recognition of this fact), so that a major part of the inquiry under both Section 201(p) and Section 505(d) is precisely the same." Brief for Petitioners, *Weinberger* v. *Bentex Pharmaceuticals, Inc., et al.,* No. 72-555, p. 57.

This attempt to reverse all prior court pronouncements on the question finds no support either in the statute or the legislative history. By the terms of Section 505(d) it is only "as used in this subsection [(d)]

and subsection (e)" that " 'substantial evidence' means evidence consisting of adequate and well-controlled investigations." Moreover, the legislative history of the 1962 Amendments confirms that the "substantial evidence" requirement was applicable only to the approval or withdrawal of approval of an NDA. See, for example, the comments of Senator Eastland summarizing the bill as Chairman of the Judiciary Committee in 108 Cong. Rec. 10366 (1962) quoted *supra,* pp. 55-56.

Therefore, we submit that the FDA's authority and duty to withdraw approval of a New Drug Application is not affected by general recognition of the drug's safety and effectiveness. It follows that the issue, as to whether there is general recognition of a drug's safety and effectiveness, does not arise in a proceeding to withdraw approval of the NDA. Contrary to the view of the Court of Appeals in *CIBA* (463 F.2d 225; Joint App. 216), there is no "threshold question" or "jurisdictional issue" as to "whether the product in question in a given case is lawfully subject to such proceeding."

The Government, as petitioner in *Hynson,* devotes a substantial part of its brief to justifying the necessity and legality of its regulations requiring that there be a genuine and substantial issue of fact before it will grant a hearing prior to withdrawal of approval of an NDA. Brief for Petitioners in No. 72-394, pp. 14-24. Yet it urges affirmance of *CIBA,* holding that the question of whether a drug is generally recognized as safe and effective is a "jurisdictional issue" which determines "whether the product in question in a given case is lawfully subject to such proceedings." If this view were adopted, it would mark the virtual end of the

agency's "summary judgment" procedure in withdrawal proceedings.

As discussed *supra,* pp. 45-48, whether a drug is generally recognized as safe and effective involves adjudicative facts, which due process requires be decided only after an evidentiary hearing. Even were the Government to prevail in its argument as petitioner in *Hynson* that the burden is on the manufacturer to show a *prima facie* case in order to gain a hearing, is not that burden met by the affidavit of a single expert attesting that the drug involved is generally recognized as safe and effective?[13]

If, as the Government insists, it can only discharge its obligations under the Act if it can bar at the threshold applications for hearing which raise no substantial and material issue of fact, then effective enforcement as well as the literal terms of the statute require that the agency's right to withdraw approval of an NDA should not depend upon a prior determination as to whether there is general recognition of the drug's safety and effectiveness.

C. The Issue in CIBA

If, then, general recognition is not an issue in the withdrawal proceeding, and the NDA has been withdrawn, does the manufacturer have a right to continue to market the drug if it is generally recognized as safe

---

[13] In fact, the obligation is on the Commissioner to make a *prima facie* case for denial of the hearing. *USV Pharmaceutical Corp.* v. *Richardson,* 466 F.2d 455 (D.C. Cir. 1972). The Government did not seek this Court's review of that decision of the Court of Appeals for the District of Columbia Circuit, but seeks its *de facto* reversal as petitioner in No. 72-394.

and effective, even though he lacks "substantial evidence of effectiveness" in the form of "adequate and well-controlled clinical studies"? The structure of the Act has led the agency and manufacturers to conclude in the past that he could. If the drug is generally recognized as safe and effective, it is not a "new drug" as defined in the Act. If it is not a "new drug," its introduction or delivery for introduction into interstate commerce without approval of an application filed under Section 505(b) is not prohibited by Section 505(a).

We submit therefore that the question presented to the District Court in a declaratory-judgment or enforcement proceeding is not one of law but one of fact: "whether the Government has shown by a preponderance of the evidence that the drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, as safe and effective for use under the conditions prescribed, recommended or suggested in the labeling thereof." *Supra*, p. 70. Clearly the Government's burden is substantially lessened if it is armed with an adverse NAS-NRC report, but nothing in the Act precludes the District Court, as a matter of law, from deciding that there is general recognition of safety and effectiveness despite the absence of "adequate and well-controlled clinical studies."

As the court observed in *Bentex*, this "is manifestly a justiciable issue and the plaintiffs are entitled to a judgment on that issue by the Court, which alone has the jurisdiction to resolve it." 463 F.2d 363, 372; Joint App. 269. The petitioner in *CIBA* was entitled to such a determination in the District Court, and that court's dismissal of the declaratory-judgment action was an

abuse of discretion. The case should be remanded to the District Court for such a determination.

In fact, *CIBA* is a case which perfectly illustrates the wisdom of the Court's withholding its ultimate decision until the issue is presented in a case in which the lower courts have applied the law to facts fully developed in the record. The case presents the question of the right to continue to market a once-new drug, which is generally recognized as safe and effective, after its NDA is withdrawn; and on this question the lower courts have not yet spoken. It is an appropriate circumstance for application of Mr. Justice Jackson's terse phrase: "Of course, we will not undertake to review what the court below did not decide." *Walters* v. *City of St. Louis,* 347 U.S. 231, 233 (1954).

D. The Issue in USV

The issue as to the NDA'ed drugs involved in *USV* is similar to that in *CIBA,* but there are significant distinctions between the two cases. In *USV* the District Court *did* decide, after trial, that the NDA'ed drugs were not "new drugs" and thus could be marketed without an NDA. It found that the NDA'ed drugs were generally recognized as safe, held that general recognition of safety was all that was required, and did not decide whether the drugs were also generally recognized as effective. Joint App. 465.

The District Court did not reach the latter question because it held that *by operation of Section 107(c)(4) of the 1962 Amendments* all of the drugs involved in *USV,* including those originally marketed under an NDA, are entitled to be marketed without an NDA if they were generally recognized as safe and hence not a "new drug" prior to the 1962 Amendments. Clearly

this is correct as to the non-NDA'ed drugs. If no New Drug Application were ever filed, there was no application to "become effective," and the drugs were "not covered by an effective application" on October 9, 1962. However, the District Court also held that, while the NDA'ed drugs "were all covered [by effective New Drug Applications] at one time," those "applications . . . were withdrawn prior to October of 1962." Joint App. 464.

The Court of Appeals reversed both holdings. While accepting the trial court's view that a drug for which no NDA was ever filed met the requirements of Section 107(c)(4), the Court of Appeals held that if a manufacturer marketed one drug under an effective NDA its similar non-NDA'ed drugs were "covered" by that application. In this it was in error. As the Government now concedes, the same rule must apply to all non-NDA'ed drugs, regardless of their manufacturer.

The Court of Appeals also reversed the holding as to the NDA'ed drugs, on the ground that Section 107 (c)(4) does not apply to drugs which have been the subject of an NDA. As discussed *supra,* pp. 61-64, *amicus* believes that this holding is generally correct. However, the petitioner in *USV* argues that there are two circumstances, rather than only one, under which a drug should be held "not covered by an effective application under § 505": *first,* the obvious one in which no application was ever filed, and there was thus no application to "become effective"; and, *second,* where an application was filed and became effective, but had been withdrawn by the manufacturer with the concurrence of the FDA. The trial court found that the second

circumstance had, in fact, occurred in the case of the NDA'ed drugs involved in *USV*.

The Court of Appeals held that a proceeding under Section 505(e) was the only one provided in the Act by which the FDA could *withdraw its approval* of the NDA. However, this is a different question from whether the Act permits a manufacturer, with the concurrence of the FDA, to *withdraw its application*. On this question, *amicus* expresses no opinion.

However, for the reasons already treated at length, even if the view urged by the petitioner in *USV* is accepted, it would affect only the manufacturer's right to market the drug without an NDA, and would not affect the agency's right and duty to withdraw its prior approval of the earlier NDA if the requisite findings were made. The manufacturer's right to market the drug without an NDA, whether on a showing of general recognition of safety, or on a showing of general recognition of safety and effectiveness, is a question for the courts.

CONCLUSION

In No. 72-555, *Weinberger* v. *Bentex Pharmaceuticals, Inc., et al.*, the Court should affirm the decision of the Court of Appeals for the Fourth Circuit holding that the Food and Drug Administration does not have statutory authority to make a legally binding determination as to whether a drug which has never been the subject of a New Drug Application is a "new drug" as that term is defined in the Federal Food, Drug, and Cosmetic Act.

In No. 72-666, *USV Pharmaceutical Corporation* v. *Weinberger*, the Court should affirm that part of the decision of the Court of Appeals for the Fourth Cir-

cuit holding that a drug which has never been the subject of a New Drug Application "was not covered by an effective application," as that phrase is used in Section 107(c)(4)(C) of the Drug Amendments of 1962, even though an identical, similar, or related drug may have been marketed under an effective or approved New Drug Application.

The Court should reverse that part of the decision holding that a drug which has never been the subject of a New Drug Application was covered by an effective application, and thus not entitled to the exemption granted under Section 107(c)(4), if the identical, similar, or related drug was marketed under an effective or approved New Drug Application filed by the same manufacturer.

The Court should also affirm that part of the decision holding that the drugs marketed under New Drug Applications which became effective prior to the 1962 Amendments are not entitled to the exemption granted under Section 107(c)(4) of the amendments; unless the Court holds that a manufacturer can withdraw its application with the concurrence of the FDA, and had done so in this case, so that the subject drugs were not covered by an effective application on October 9, 1962.

In No. 72-414, *Hynson, Westcott and Dunning, Incorporated* v. *Weinberger,* the Court should affirm the decision of the Court of Appeals for the Fourth Circuit holding that the drug was marketed under a New Drug Application which became effective prior to the 1962 Amendments and is not entitled to the exemption granted under Section 107(c)(4) of the amendments, and, on remand of the case to the agency for a hearing,

limiting the issue to whether there is "substantial evidence" of effectiveness.

In No. 72-528, *CIBA Corporation* v. *Weinberger*, the Court should reverse the decision of the Court of Appeals for the Third Circuit and remand the case to the District Court for a determination as to whether the drug involved is generally recognized as safe and effective and thus entitled to be marketed despite the FDA's withdrawal of its approval of the New Drug Application.

Respectfully submitted,

THOMAS D. FINNEY, JR.
JOHN F. KOVIN
THOMAS RICHARD SPRADLIN
815 Connecticut Avenue
Washington, D.C. 20006

DANIEL F. O'KEEFE, JR.
1700 Pennsylvania Avenue
Washington, D.C. 20006

Of Counsel:

CLIFFORD, WARNKE, GLASS,
McILWAIN & FINNEY
Washington, D.C.

April 3, 1973

APPENDIX

The Proposed Procedures for Regulation of Over-the-Counter Drugs

A. The Purpose and Method of the Regulations

In his original proposal published for comment on January 5, 1972 (37 Fed. Reg. 85 *et seq.*), the Commissioner thus described the theory and purpose of the proposed regulations:

> "The Food and Drug Administration intends to require that all unapproved new drugs and misbranded drugs either be reformulated and/or relabeled to meet all requirements of the act or be removed from the market. In carrying out its responsibilities in this area, the Food and Drug Administration may either initiate a separate court action with respect to each violative OTC drug or deal with all OTC drugs through rulemaking by therapeutic classes on an industrywide basis. It has been determined that the latter approach should be pursued. * * *
>
> "Accordingly, the Commissioner proposes to establish procedures for rule making which will result in classifying some OTC drugs as generally recognized among qualified experts as safe and effective and not misbranded under prescribed, recommended, or suggested conditions of use. Any OTC drug not meeting the requirements established for such drugs pursuant to this procedure will have to be the subject of an approved new-drug application prior to marketing. (Since a grandfathered drug that is found to be misbranded would be required to change its formulation and/or labeling and thus lose its grandfathered status, any such product must either meet the applicable monograph or be the subject of an approved new-drug application in order to be legally marketed.) A deviation from a monograph will be approved for an individual

Microcard Editions
An Indian Head Company
A Division of Information Handling Services
5500 S. VALENTIA WAY
ENGLEWOOD, COLORADO TEL. NO. 303-771-2600

CARD 17

manufacturer through approval of a new-drug application justifying such a deviation. Shipment of a nonconforming OTC drug (one neither classified as generally recognized as safe and effective and not misbranded, nor subject to an approved NDA) in interstate commerce will be prohibited. Responsible persons and the manufacturer and distributor will be subject to criminal prosecution and injunctive action, and the drug will be subject to seizure and injunction on the ground that the drug is an unapproved new-drug or is a misbranded drug (if it is exempt from the new-drug definition under the 1938 or 1962 grandfather clause)." 37 Fed. Reg. 86 (1972).

B. The Procedure To Be Followed

The procedure by which monographs are to be issued is set forth in subsection (a) of the final order. 21 C.F.R. § 130.301(a), 37 Fed. Reg. 9473 *et seq.* (1972). The Commissioner will first appoint an advisory review panel "of qualified experts" to evaluate the safety and effectiveness of each category of OTC drugs enumerated in subsection (b). § 130.301(a)(1), 37 Fed. Reg. 9473. Interested persons will be allowed to submit in specified form, for review and evaluation by the advisory review panel, published and unpublished data and information pertinent to the category of drugs or any marketed drug within the class. §130.301 (a)(2), 37 Fed. Reg. 9473-74. Any interested person may also request an opportunity to present oral views to the panel, but the order states that "such request may be granted or denied by the panel." § 130.301(a)(3), 37 Fed. Reg. 9474.

Following review of data submitted to it, the advisory review panel will prepare and submit to the Commissioner a report containing its conclusions and recommendations with respect to the conditions under which OTC drugs falling within the designated category are generally recognized as safe and effective and not misbranded. § 130.301(a)(5),

37 Fed. Reg. 9474. Included within the report will be a recommended monograph or monographs covering the category of OTC drugs and establishing conditions under which the drugs involved are generally recognized as safe and effective and not misbranded. The monograph may include any conditions relating to active ingredients, labeling indications, warnings and adequate directions for use, prescription or OTC status, and any other conditions necessary and appropriate for the safety and effectiveness of drugs covered by the monograph. § 130.301(a)(5), 37 Fed. Reg. 9474.

The final order provides that after his receipt of the report and recommendations of an advisory review panel, the Commissioner will publish a proposed order containing "a monograph . . . establishing conditions under which a category of OTC drugs is generally recognized as safe and effective and not misbranded," and permitting written comments. § 130.301(a)(6), 37 Fed. Reg. 9474. After reviewing the comments the Commissioner will publish a tentative final order to which any interested party may file written objections and request "an oral hearing" (*i.e.*, an oral argument) before the Commissioner. § 130.301(a)(7), 37 Fed. Reg. 9474. After reviewing the objections and considering "the arguments made at any oral hearing," the Commissioner will publish "a final order containing a monograph *establishing* conditions under which a category of OTC drugs is generally recognized as safe and effective and not misbranded." (Emphasis added.) § 130.301(a)(9), 37 Fed. Reg. 9475. This latter order is defined as constituting "final agency action from which appeal lies to the courts." § 130.301(a)(10), 37 Fed. Reg. 9475.

C. The Standards To Be Employed

The final order establishes mandatory standards to be employed in determining whether a drug is "safe," "effective," and "generally recognized as safe and effective." Those standards are applicable to both the advisory review

panel and the Commissioner. The final order states, "The advisory review panel, in reviewing the data submitted to it and preparing its conclusions and recommendations, and the Commissioner, in reviewing the conclusions and recommendations of the panel and the published proposed, tentative, and final monographs, shall apply the following standards . . . ." § 130.301(a)(4), 37 Fed. Reg. 9474.

The regulations provide that "Proof of safety shall consist of adequate tests by methods reasonably applicable to show the drug is safe . . . ." § 130.301(a)(4)(i), 37 Fed. Reg. 9474. They also prescribe an even more rigorous standard, heretofore applicable only to "new drugs," for proof of effectiveness:

> "Proof of effectiveness shall consist of controlled clinical investigations as defined in § 130.12(a)(5)(ii), unless this requirement is waived on the basis of a showing that it is not reasonably applicable to the drug or essential to the validity of the investigation and that an alternative method of investigation is adequate to substantiate effectiveness. Investigations may be corroborated by partially controlled or uncontrolled studies, documented clinical studies by qualified experts, and reports of significant human experience during marketing. Isolated case reports, random experience, and reports lacking the details which permit scientific evaluation will not be considered." § 130.301(a)(4)(ii), 37 Fed. Reg. 9474.

The proposed regulations also specify that "General recognition of safety [and effectiveness] shall ordinarily be based upon published studies which may be corroborated by unpublished studies and other data." § 130.301(a)(4)(i) and (ii), 37 Fed. Reg. 9474.

D. The Intended Legal Effect of Final Monographs

The original proposal as published for comment on January 5, 1972, in paragraphs (b)(1) to (4) asserted directly that the Commissioner's determination, as to whether a drug is generally recognized as safe and effective, or

whether its labeling is false, misleading, or inadequate, would constitute a "substantive rule" which could not be challenged in a subsequent legal action for enforcement of the Act. It specifically stated that "an OTC drug which falls within the category of drugs covered by [a] monograph shall be deemed not to be generally recognized . . . as safe and effective . . . unless it complies with all of the conditions established by that monograph" (§130.301(b)(2), 37 Fed. Reg. 88); that a drug exempt from the new-drug provisions by the 1938 or 1962 "grandfather" clauses "shall be deemed to be misbranded and in violation of Section 502 of the Act, unless it complies with all of the conditions established by that monograph" (§ 130.301(b)(3), 37 Fed. Reg. 88); that "an OTC drug falling within the category of drugs covered by [a] monograph shall, prior to its marketing, either comply with all of the conditions established in that monograph or be the subject of an approved new drug application" (§ 130.301(b)(4), 37 Fed. Reg. 88-89); and that "any such drug which fails to meet one or the other of these two conditions shall be *in violation of the Act* and shall be subject to *summary court procedure* for a determination of illegality" (*Id.*). (Emphasis added).

The Commissioner's discussion of the legal effect of the monographs makes clear that the term "substantive rules" is used as synonymous with "legislative rules," in contrast to "interpretive rules"—i.e., that he intends the final monographs to have the force of law. His final order asserts that "It is . . . within the discretion of the Commissioner, subject to court review, to decide whether the circumstances warrant proceeding to enforce the Act through interpretive guidelines that can be collaterally attacked in enforcement litigation or through substantive rules that are binding upon court appeal." Comments, para. 85, 37 Fed. Reg. 9472.

The Commissioner's final order also asserts that he proposes to use rule-making procedures "to particularize

general statutory standards." Comments, para. 85, 37 Fed. Reg. 9471. This also appears to be a reference to the type of legislative rule-making which is sometimes authorized by Congress. The effect of such rules was concisely described in *Superior Oil Company* v. *Federal Power Commission*, 322 F.2d 601, 614 (9th Cir. 1963), in discussing such legislative rule-making by the FPC:

> "[The order being reviewed] brought about the rule amendment by means of which the Commission determined, for prospective application, that certain kinds of price-changing clauses are contrary to the public interest. The rule amendment thereby accomplished thus gave specificity, in a particular area, to the statutory standard of public interest. Assuming that the Commission had substantive authority to promulgate this amendment . . . , the rule had the same function and effect as if it were a statute proscribing, in the same explicit terms, the described price-changing provisions. So viewed . . . the application in a particular case of the explicit standard stated therein no more entitled persons affected to an evidentiary hearing as to the general merit of the standard than would have been the case if this concreteness had been expressed in the statute itself."

Thus, if they are legislative (or "substantive") rules, the factual determinations made in final monographs would not be subject to challenge in subsequent civil or criminal proceedings for their enforcement, and upon judicial review the court could set aside the agency action only if it was found to be arbitrary and capricious, contrary to constitutional right, in excess of the agency's statutory authority, or taken without observance of the procedures required by law. 5 U.S.C. § 706.

The final order omits paragraphs (b)(1) to (4) relating to the legal status of monographs, and gives the following explanation in Paragraph 91 of the comments:

> "Finally, some comments have noted that paragraph (b) is gratuitous, since it merely states the legal en-

forcement position that the Food and Drug Administration intends to adopt in the event of subsequent regulatory action, and therefore should be deleted. It has been pointed out that there is no comparable statement of legal enforcement position in similar agency regulations. The Commissioner finds this comment persuasive, and accordingly has deleted all of paragraph (b). The parts of former paragraph (b) which related to taking regulatory action on non-conforming products and to new drug applications justifying deviation from a final monograph have been added as new subparagraphs (12) and (13) under paragraph (a). The comments have pointed out that the regulations will be substantially followed by industry. Accordingly, it may become unnecessary to institute a substantial amount of regulatory action to enforce final monographs. Development of a specific enforcement policy can await promulgation of final monographs after which the industry response will be apparent. The Commissioner at that time may adopt whatever enforcement policy is best suited to guarantee full compliance by all OTC drugs with the provisions of the act." 37 Fed. Reg. 9472.

It is not clear what the Commissioner means by "enforcement policy," but his position apparently is that he can issue a final monograph, and decide later whether what he issued was an "interpretive guideline" or a "substantive rule." See Comments, para. 85, 37 Fed. Reg. 9472. Thus, his contention is either that the final monographs will have the force of law, or may be given such force after their issuance at his election.